Chapter XIII.

THE QUALIFICATIONS OF THE MEMBER.

413. The Constitution provides that a Member shall fulfill certain conditions as to age, citizenship, and inhabitancy.—Section 2 of Article I of the Constitution provides:

> No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

414. The election case of William McCreery, of Maryland, in the Tenth Congress.

A question arising in 1807 as to the right of a State to prescribe qualifications for Representatives, the House, while inclining manifestly to the view that the States did not have the right, avoided an explicit declaration.

Discussion of the three constitutional qualifications as exclusive of others.

On October 30, 1807,[4] Joshua Barney presented a memorial contesting the election of William McCreery, of Maryland. On November 9 the Committee of Elections made a report showing the following facts:

The law of Maryland (act of 1790) required the Member to be an inhabitant of his district at the time of his election, and to have resided therein twelve calendar months immediately before.

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[1] Many decisions that disqualification of the majority candidate does not give title to the minority candidate. (See secs. 323, 326, 424, 435, 450, 459, 460, 467, 469, 473, 621, 807.) Also an elaborate Senate discussion. (Sec. 463 of this volume.)

[2] Senate case of Lucas *v.* Faulkner. (Sec. 632 of this volume.)

[3] See also cases of Upton (sec. 366 of this volume) and Pigott (sec. 369 of this volume).

[4] First session Tenth Congress, Contested Elections in Congress, 1789 to 1834, p. 167. Reports, No. 1; Annals, p. 870; Journal, p. 44. Mr. McCreery had already taken the oath without question; Journal, p. 6.

The law of Maryland (act of 1802) provided that Baltimore town and county should be a district entitled to send two Representatives in Congress, one to be a resident of Baltimore City and the other a resident of Baltimore County.

At the election the poll resulted, 6,164 votes for Nicholas P. Moore, indisputably a resident of Baltimore County; 3,559 votes for William McCreery, whose claim to the required residence in Baltimore City is questioned; 2,063 votes for Joshua Barney, indisputably a resident in Baltimore City, and who contests the seat of Mr. McCreery; 353 votes for John Seat, a resident of Baltimore City.

The committee reported the conclusion that the law of Maryland prescribing the qualifications of Members was unconstitutional, and therefore reported a resolution that William McCreery, who unquestionably had a majority of votes for the Baltimore City seat, was entitled to the seat. The committee did not attempt to ascertain whether or not Mr. McCreery had the residence requirements of the law of Maryland.

This report was the subject of exhaustive debate in the House, lasting from November 12 to 19.[1]

It was urged, in behalf of the report, that the qualifications of the National Legislature were of a national character and should be uniform throughout the nation and be prescribed exclusively by the national authority. The people had delegated no authority either to the States or to Congress to add to or diminish the qualifications prescribed by the Constitution. In denying the right of the States to add qualifications, the Congress was only protecting the rights of their citizens against encroachments on their liberties by their own State legislatures, which were corporate bodies not acting by natural right, but restrained by both Federal and State constitutions. The reserved power of the States could operate only when, from the nature of the case, there could be no conflict with national power. Congress had the power under the Constitution to collect taxes. From the nature of the case the same power was reserved to the States. Congress had power to "establish post-offices and post-roads." From the nature of the case the States would not reserve this power. In the same way the States could not reserve a power to add to the qualifications of Representatives. If they could do this, any sort of dangerous qualification might be established—of property, color, creed, or political professions. The Constitution prescribed the qualifications of President, as it did of Representatives. Did anyone suppose that a State could add to the qualifications of the President? In the case of Spaulding *v.* Mead, the House had decided that a State law could not render void returns made after a certain time. Qualifications for Representatives should be firm, steady, and unalterable. The National Legislature must have the power to preserve from encroachment the national sovereignty. A part of the Union could not have power to fix the qualifications for the Members of the Assembly of the Union. It is presumed that written documents say all they mean. Had the makers of the Constitution meant that there might be other qualifications, they would have said so. The people had a natural right to make choice of their Representatives, and that right should be limited only by a convention of the people, not by a legislature. The

[1] Annals, pp. 870–950.

powers of the House were derived from the people, not from the States. The power to prescribe qualifications had been given neither to Congress nor the States. The States might establish districts, but they might not prescribe that Representatives should be confined to the districts. The Constitution had carefully prescribed in what ways the States might interfere in the elections of Congressmen. They might prescribe the "times, places, and manner" of holding elections, reserving to Congress the right to "make or alter" such regulations. This was all the Constitution gave to the States. It had been urged that the language of the clause prescribing the qualifications was negative, but so also was the language of the clause prescribing the qualifications of the President. The qualifications of Representatives did not come within the range of powers granted, but rather were the means of exercising those powers. The powers reserved to the States were reserved to them as sovereignties, but the qualifications of the Members of the House of Representatives of the nation never belonged to those sovereignties, but flowed from the people of the United States.

It was urged against the report that the positive qualifications assumed by the Constitution did not contain a negative prohibition of the right of the States to impose other qualifications. The State by annexing the provision for a residence in a district did not interfere with the constitutional requirement of residence in the State. Whatever rights were not expressly delegated to the United States were reserved to the States themselves or to the people. A right could not be delegated absolutely which could be exercised conjointly. For the House to declare a long-existing State law unconstitutional would be a dangerous act. In prescribing the qualifications of the voters the Constitution was positive, but in prescribing the qualifications of the Representatives in Congress the language was significantly negative. The Constitution did not fix the qualifications; it simply enumerated some disqualifications within which the States were left to act. The power contended for by Maryland must be included in the common and usual powers of legislation, and not being delegated to the General Government must reside in the States. Because the House was constituted the judge of the qualifications of its Members, it did not follow that it could constitute or enact qualifications. The functions were distinct. No harm could come from the exercise by the States of the power to prescribe qualifications, since the power would be used with discretion.

In the course of the debate a resolution that "William McCreery is duly elected according to the laws of Maryland and is entitled to his seat in this House" was negatived by a large vote.

Then a resolution was offered declaring that neither Congress nor the State legislatures could add to or take away from the qualifications prescribed by the Constitution, that the law of Maryland was void, and that William McCreery was entitled to his seat. This resolution did not come to a vote, as the committee rose after it was offered, and on the next day, November 19, the House discharged the Committee of the Whole from the subject and recommitted it to the Committee on Elections.[1]

On December 7[2] the committee reported, presenting evidence at length on the

[1] Journal, p. 36.

[2] Annals, p. 1059.

subject of Mr. McCreery's residence, but expressing no opinion on that subject, and recommending the adoption of the following resolution:

Resolved, That William McCreery, having the greatest number of votes, and being duly qualified agreeably to the Constitution of the United States, is entitled to his seat in this House.

On December 23 this resolution was debated in Committee of the Whole, where a disinclination to come to a decision on the rights of the States was manifest. This finally took form in the adoption of the following amendment, offered by Mr. Robert Marion, of South Carolina:

Strike out all the portion relating to votes and qualifications, so that the resolution reads as follows:

Resolved, That William McCreery is entitled to his seat in this House.

The Committee of the Whole agreed to this amendment, which, being reported to the House, was agreed to by a vote of yeas 70, nays 37. Both Mr. William Findley, of Pennsylvania, who had supported the original report, and Mr. John Randolph, of Virginia, who had made the main argument in opposition, voted against the amendment.[1]

The amendment of the Committee of the Whole having been agreed to, Mr. John Randolph, of Virginia, moved a further amendment by inserting after the word McCreery the following:

By having the qualifications prescribed by the laws of Maryland.

Mr. Randolph explained that he wished to bring the constitutionality of the law of Maryland before the House. On December 24 the question was taken on Mr. Randolph's amendment, and it was decided in the negative—yeas 8, nays 92.

The question then being taken on the adoption of the resolution:

Resolved, That William McCreery is entitled to his seat in this House.

And it was agreed to—yeas 89, nays 18.

Mr. Randolph was one of those voting nay.[2]

415. The Illinois cases of Turney v. Marshall and Fouke v. Trumbull in the Thirty-fourth Congress.

In 1856 the House decided that a State might not add to the qualifications prescribed by the Constitution for a Member.

The governor of a State having declined to issue credentials to rival claimants, the House seated the one shown prima facie by official statement to have a majority of votes. (Footnote.)

An instance wherein a contest was maintained against a Member-elect who had not and did not take the seat.

Discussion of the three constitutional qualifications as exclusive of others.

In 1856 the House considered and decided a question as to the qualifications of a Member who had already been seated on his prima facie showing.

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[1] Journal, p. 91; Annals, p. 1231.

[2] Journal, pp. 93–95; Annals, p. 1238.

On June 24, 1856,[1] Mr. John A. Bingham, of Ohio, from the Committee on Elections, reported in the two Illinois contested election cases of Turney *v.* Marshall and Fouke *v.* Trumbull. Each of these cases arose out of the following clause in the constitution of Illinois:

> The judges of the supreme and circuit courts shall not be eligible to any other office or public trust of profit in this State, or the United States, during the term for which they are elected, nor for one year thereafter. All votes for either of them, for any elective office (except that of judge of the supreme or circuit court), given by the general assembly or the people, shall be void.

Both Messrs. Marshall and Trumbull were indisputably under this disqualification, and the contestants claimed the seats on the ground that the votes cast for them "were null and void."

Thus was presented the question whether a State might superadd to the qualifications prescribed by the Constitution of the United States for a Representative in Congress.

After quoting Chancellor Kent's saying "the objections to the existence of any such power appear to me too palpable and weighty to admit of any discussion," the report proceeds:

> And Mr. Justice Story, upon the same question, says that "the States can exercise no powers whatsoever, which exclusively spring out of the existence of the National Government, which the Constitution does not delegate to them. They have just as much right, and no more, to prescribe new qualifications for a Representative as they have for a President. Each is an officer of the Union, deriving his powers and qualifications from the Constitution, and neither created by, dependent upon, nor controllable by the States. It is no original prerogative of State power to appoint a Representative, or Senator, or President for the Union. (Story's Commentaries, vol. ii, page 101.)
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> The second section of the first article of the Constitution of the United States provides that the people of the several States shall choose their Representatives in Congress every second year, and prescribes the qualifications both of the electors and the Representatives.
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> The qualification of electors is as follows:
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> "The electors in each State" (who shall choose Representatives in Congress) "shall have the qualifications requisite for electors of the most numerous branch of the State legislature."
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> The qualifications of a Representative, under the Constitution, are that he shall have attained the age of 25 years, shall have been seven years a citizen of the United States, and, when elected, an inhabitant of the State in which he shall be chosen. It is a fair presumption that, when the Constitution prescribes these qualifications as necessary to a Representative in Congress, it was meant to exclude all others. And to your committee it is equally clear that a State of the Union has not the power to superadd qualifications to those prescribed by the Constitution for Representatives, to take away from "the people of the several States" the right given them by the Constitution to choose, "every second year," as their Representative in Congress, any person who has the required age, citizenship, and residence. To admit such a power in any State is to admit the power of the States, by a legislative enactment, or a constitutional provision, to prevent altogether the choice of a Representative by the people. The assertion of such a power by a State is inconsistent with the supremacy of the Constitution of the United States, and makes void the provision that that Constitution "shall be the supreme law of the land," anything in the constitution or laws of any State to the contrary notwithstanding.
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> Your committee submit that the position assumed by those who claim for the States this power, that its exercise in nowise conflicts with the Constitution, or the right of the people under it to choose any person having the qualifications therein prescribed, has no foundation in fact.

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[1] First session Thirty-fourth Congress, 1 Bartlett, p. 166; Rowell's Digest, p. 141; House Report No. 194.

By the Constitution the people have a right to choose as Representative any person having only the qualifications therein mentioned, without superadding thereto any additional qualifications whatever. A power to add new qualifications is certainly equivalent to a power to vary or change them. An additional qualification imposed by State authority would necessarily disqualify any person who had only the qualifications prescribed by the Federal Constitution.

Your committee can not assent to the averment of the memorialist, Mr. Fouke, that "the question presented is not one of qualification of a Member of Congress arising under the Constitution of the United States, but a question of election arising under the constitution and laws of the State of Illinois."

It is not intimated either by the memorialist, or any one else, that the persons who voted at said election in said several districts were not qualified electors and legally entitled to vote, nor is it intimated that said election was not conducted in all respects as required by law. In short, the only point made by the memorialist is that Mr. Marshall, who received a large majority of all the votes cast in said Ninth district, and Mr. Trumbull, who received a large majority of all the votes cast in the said Eighth district, were each of them ineligible to a seat in Congress, not because either of them lacked any qualification prescribed by the Constitution of the United States, but because each of them was disqualified by operation of the provisions of the constitution of the State of Illinois. If the respective terms for which those two gentlemen had been elected judges of the said State had expired more than one year before the 7th of November, 1854, we would have had no intimation that the votes cast for each of them were in contemplation of law no votes; their election would, under these circumstances, have been conceded, because they would have been acknowledged as not disqualified to hold the office under and by virtue of the constitution of the State of Illinois. If the State of Illinois may thus disqualify any class of persons possessing all the qualifications required by the Federal Constitution for a Representative in Congress for a period of ten years, and another class for a period of five years, what is there to restrain that State from imposing like disabilities upon all citizens of the United States residing within her territory, and thus take away from the people the right to choose Representatives in Congress every second year, declaring, in effect, that only every fifth or tenth year shall the people choose their Representatives? It is no answer to say that these disabilities are self-imposed by the majority of the people of the State. The majority of the people within the several States have not the power to impair the rights of the minority guaranteed by the Constitution of the United States and exercised under its authority'

By the plain letter of the Constitution Congress may prescribe the time, place, and manner of holding elections for Representatives, and at such time and place, and in the manner thus prescribed—every second year—the people of each State may choose as Representative in Congress any person having the qualifications enumerated in that Constitution. The power attempted to be asserted by the State of Illinois in the cases before us is in direct contravention of the letter, as also of the spirit, true intent, and meaning of these provisions of the Federal Constitution, and absolutely subversive of the rights of the people under that Constitution. Your committee, therefore, conclude that the said tenth section of the fifth article of the constitution of the State of Illinois is inoperative in the premises; that the said Trumbull and Marshall were each eligible to the office of Representative in Congress at the time of said election, it being conceded that on that day they possessed all the qualifications for that office required under the Constitution of the United States; and that the votes given to each of them were not void, as alleged, because they were given by electors having the qualifications prescribed by the Constitution of the United States, and at the time and place and in the manner prescribed by law.

On April 7 and April 10 [1] the report was debated in the House. Mr. Trumbull had never taken his seat in the House, having been elected to the Senate. So in the contest in his case, the committee tested the question before the House with the following resolution:

Resolved, That the Hon. P. B. Fouke, who has presented to this House his memorial claiming to represent the Eighth district of Illinois in the Thirty-fourth Congress, was not duly elected as claimed by him, and is not entitled to a seat in this House, and that said seat is vacant.

This resolution was agreed to—yeas 135, nays 5.

[1] Journal, pp. 805–808; Globe, pp. 829, 864.

Then a resolution declaring that Mr. Turney was not elected and that Samuel S. Marshall,[1] the sitting Member, was entitled to the seat, was agreed to without division.

416. In 1856 the Senate decided that a State might not add to the qualifications prescribed by the Constitution for a Senator.

In the Senate in 1856 a Senator-elect was sworn on his prima facie right, although his qualifications were questioned.

In 1856 the Senate considered and decided a question as to the qualifications of a Member who had already been seated on his prima facie showing.

On February 27, 1856,[2] the Senate Judiciary Committee reported on the right of Mr. Lyman Trumbull, of Illinois, to a seat in the Senate. A provision of the constitution of Illinois provided that certain judges of that State should not be eligible to any other office of the State or United States during the term for which they were elected nor for one year thereafter. Mr. Trumbull had been a judge and came within the prohibitions of the constitution. Hence a question arose as to the effect of qualifications imposed by a State in addition to the qualifications imposed by the Constitution.

On December 3, 1855,[3] when Mr. Trumbull appeared to take the oath, a protest reciting the facts was filed, but no objection was offered to his taking the oath, which he accordingly did.

On February 20 and 27,[4] and March 3 and 5,[5] 1856, the question was debated at length, and on the latter day, by a vote of yeas 35, nays 8, Mr. Trumbull was declared entitled to the seat.

417. The Kansas election case of Wood v. Peters in the Forty-eighth Congress.

In 1884 the House reaffirmed its position that a State may not add to the qualifications prescribed by the Constitution for a Member.

Discussion as to whether or not a Member is an officer of the Government.

On March 18, 1884,[6] Mr. Mortimer F. Elliott, of Pennsylvania, from the Committee on Elections, presented the report of the majority of the committee in the Kansas case of Wood *v.* Peters.

The sitting Member had received, on the general ticket, 99,866 votes, and contestant 83,364. The contestant claimed the seat on the sole ground that Mr. Peters was ineligible at the time he was voted for.

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[1] The Journal and Globe show that Mr. Marshall's name was on the roll when the House first met, and that on February 4, after the Speaker was finally chosen, he was sworn in without objection. (Journal, pp. 7, 448; Globe, pp. 2, 353.) But from the debate (Mr. Orr's speech, Globe, p. 831) it appears that the governor of Illinois had declined to issue credentials to any of the four, but sent them all with a statement of facts. Mr. Marshall was seated on his prima facie showing of a majority of votes. For a copy of governor's statement, which was really a duly authenticated certificate, see Globe, page 865.

[2] First session Thirty-fourth Congress, 1 Bartlett, p. 618.

[3] Globe, p. 1.

[4] Globe, pp. 466, 514.

[5] Globe, pp. 547–552, 579–584.

[6] First session Forty-eighth Congress, House Report No. 794; Mobley, p. 79.

The constitution of Kansas provided that judges of the supreme and district courts of the State should not "hold any office of profit or trust under the authority of the State or the United States during the term of office for which said justices or judges shall be elected."

It was conceded that Mr. Peters came within this prohibition, and the majority say:

It is clear that Peters falls within the inhibition of the constitution of Kansas, and if a State possesses the power to add to the qualifications prescribed by the Constitution of the United States for Representatives in Congress, then he was ineligible at the time he was voted for, and is not entitled to a seat in this House.

Article I, section 2, of the Constitution of the United States provides that—

"No person shall be a Representative who shall not have attained the age of 25 years and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of the State in which he shall be chosen."

The Constitution, by prescribing certain qualifications enumerated in the section just quoted, according to a well-settled rule of construction, excludes all others.

The States have no power to superadd other qualifications, for the reason that such power can not, in the nature of things, be found among the reserved rights of the States, and no such power is delegated to them by the Federal Constitution.

Congress is the creature of the Constitution of the United States, and the right of the people of the several States to representation therein is derived wholly from that instrument, and the States could not have reserved the right to prescribe qualifications of Members of Congress, when the right to elect them at all grew out of the formation of the National Government.

The question involved in this contest is not a new one. It has been too well settled to require further elaboration, and the committee will content themselves with a reference to a few of the authorities on the subject:

"Now, it may properly be asked, where did the State get the power to appoint Representatives in the National Government? Was it a power that existed at all before the Constitution was adopted? If derived from the Constitution, must it not be derived exactly under the qualifications established by the Constitution, and none others? If the Constitution has delegated no power to the States to add new qualifications, how can they claim. any such power by the mere adoption of that instrument, which they did not before possess?

"The truth is that the States can exercise no powers whatsoever, which exclusively spring out of the existence of the National Government, which the Constitution does not delegate to them. They have just as much right, and no more, to prescribe new qualifications for a Representative as they have for a President. Each is an officer of the Union, deriving his powers and qualifications from the Constitution, and neither created by, dependent upon, nor controllable by the States. It is no original prerogative of State power to appoint a Representative, a Senator, or President for the Union. (Story on the Constitution, vol. 1, secs. 626 and 627.)

"The question whether the individual States can superadd to or vary the qualifications prescribed to the Representative by the Constitution of the United States is examined in Mr. Justice Story's Commentaries on the Constitution, volume 1, pages 99 to 103, but the objections to the existence of any such power appears to me to be too palpable and weighty to admit of any discussion. (1 Kent's Commentaries, p. 228, note F.)"

To same effect, Paschal's Annotated Constitution, page 305.

The precise question presented in this case was determined by this House in the cases of Turney *v.* Marshall, and Fouke *v.* Trumbull, of Illinois. (Bartlett's Contested Election Cases from 1834 to 1865, p. 167.)

The tenth section of the fifth article of the constitution of the State of Illinois, which was adopted on the 6th day of March, 1848, is in the words following:

"The judges of the supreme and circuit courts shall not be eligible to any other office or public trust of profit in this State or the United States during the term for which they were elected, nor for one year thereafter. All votes for either of them for any elective office (except that of judge of the supreme or circuit courts), given by the general assembly or the people, shall be void."

Marshall and Trumbull had been judges of Illinois, and at the time they were elected Members of Congress were clearly within the prohibitory provisions of the constitution of that State.

The Committee on Elections, in their report to the House on these cases, state the questions to be determined as follows:

"This presents the question whether a State may superadd to the qualifications prescribed to the Representative in Congress by the Constitution of the United States."

The committee reached the conclusion that a State could not add to the qualifications prescribed by the Constitution of the United States, and reported that Trumbull and Marshall were entitled to their seats. The report of the committee was sustained by the House by a decisive vote.

Trumbull's case, determined by the United States Senate in 1856, is also directly in point. (Election Cases from 1834 to 1865, p. 618.)

The authorities cited place the question involved in this case beyond the realm of doubt. It is very clear that S. R. Peters was duly elected a Member of the Forty-eighth Congress from the State of Kansas at large, and that he possessed all the qualifications requisite to entitle him to take his seat.

The committee, therefore, submit the following resolution and recommend its adoption:

Resolved, That S. R. Peters was duly elected a Member of Congress from the State of Kansas, and is entitled to his seat.

Mr. R. T. Bennett, of North Carolina, filed minority views in which he argued at length, with an abundant citation of precedents, and an elaborate review of the Constitution, that the State had the right to prescribe the additional qualification. He also argued that Senators and Representatives were not "officers" of the General Government.

Assuming that Mr. Peters was disqualified, he next argued elaborately, with a review of precedents, that the minority candidate was entitled to be seated. This argument was replied to by Mr. Elliott in the course of the debate.[1]

The minority proposed resolutions declaring Mr. Peters ineligible, and seating Mr. Wood.

The report was debated April 23,[2] and on that day the minority proposition declaring Mr. Peters ineligible was disagreed to; ayes 20; noes 106. The next proposition declaring Mr. Wood entitled to the seat was disagreed to.

Then the majority resolution confirming the title of Mr. Peters was agreed to without division.

418. A Member-elect whose credentials were in due form, but whose age was not sufficient to meet the constitutional requirement, was not enrolled by the Clerk.

A Member-elect not being of the required age, the taking of the oath was deferred until he was qualified.

On December 5, 1859,[3] among the Members-elect appearing with credentials was Mr. John Young Brown, of Kentucky. His name appears in the list of Members-elect in the Congressional Globe of that date, but does not appear in the Journal on the roll of Members-elect called by the Clerk.

In this Congress there was a contest for Speaker lasting from December 5, 1859, until February 1, 1860, when, on the forty-fourth vote, a Speaker was elected. Mr. Brown does not appear among those voting in this contest, nor was he sworn in on

[1] Record, p. 3298.

[2] Record, pp. 3296–3303; Appendix, p. 75; Journal, pp. 1115–1117.

[3] First session Thirty-sixth Congress, Journal, p. 7; Globe, p. 2.

February 1,[1] when the oath was administered to the Members of the House by the Speaker.

At the beginning of the next session, on December 3, 1860,[2] Mr. Brown was sworn in.

No explanation was given on any of the above dates of the delay of Mr. Brown in taking the oath.

The reason for the delay appears incidentally in a debate on June 18, 1860,[3] when Mr. John W. Stevenson, of Kentucky, explained that Mr. Brown was under the constitutional age, and had not been sworn in, although the State authorities of Kentucky had issued a certificate to him.[4]

419. The Constitution defines what shall constitute citizenship of the United States and of the several States.—Section 1 of Article XIV of the Constitution provides:

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[5]

420. The South Carolina case of William Smith, the first election case in the First Congress.

A native of South Carolina, who had been abroad during the Revolution and on his return had not resided in the country seven years, was held to be qualified as a citizen.

The House decided a Member-elect entitled to a seat on his prima facie right, although knowing that his qualifications were under examination.

In the first election case the Committee on Elections were directed to take proofs, but not to present any opinion thereon.

A Member whose qualifications were questioned was permitted to be present before the committee, cross-examine, and offer counter proofs.

Instance of an inquiry as to a Member-elect's qualifications instituted by petition.

As to whether or not a disqualified Member who has taken the oath may be excluded by a majority vote.

As to the effect of absence from the country on the question of citizenship.

The First Congress assembled on March 4, 1789, and a quorum not being present the House met and adjourned daily until April 1, when a quorum appeared

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[1] Journal, p. 166; Globe, p. 655.

[2] Second session Thirty-sixth Congress, Journal, p. 7; Globe, p. 2.

[3] First session, Thirty-sixth Congress, Globe, p. 3125.

[4] William C. C. Claiborne, of Tennessee, said to have been born in 1775, took his seat in the House on November 23, 1797, without question, although if the date of his birth is correct he was only 22 years of age. (Second session Fifth Congress, Journal, p. 84; Vol. IV, New International Encyclopaedia.)

[5] This portion of the Constitution was declared ratified July 21, 1868.

and a Speaker was elected. On April 13[1] Mr. William Smith, of South Carolina, appeared and took his seat. On April 15[2] a petition of David Ramsay, of the State of South Carolina, was presented to the House and read, setting forth that Mr. Smith was at the time of his election ineligible and came within the disqualification of the third paragraph of the Constitution, which declared that no person should be a Representative who should not have been seven years a citizen of the United States.[3] This petition was referred to the Committee on Elections with instructions to report "a proper mode of investigating and deciding thereupon." This Elections Committee, which had already been chosen, consisted of Messrs. George Clymer, of Pennsylvania; Fisher Ames, of Massachusetts; Egbert Benson, of New York; Daniel Carroll, of Maryland; Alexander White, of Virginia; Benjamin Huntington, of Connecticut; and Nicholas Gilman, of New Hampshire.

On April 18,[4] in accordance with a usage then established and continued in several Congresses, the Committee on Elections reported a list of the Members whose credentials were "sufficient to entitle them to take seats in this House," and the House agreed to the report. The name of William Smith, of South Carolina, was on this list.

On the same day, and very soon thereafter, the Committee on Elections reported as to the case of Mr. Smith, the report, after amendment by the House, being as follows:

> That in this case it will be sufficient, in the first instance, that a committee take such proofs as can be obtained in this city respecting the facts stated in the petition, and report the same to the House; that Mr. Smith be permitted to be present from time to time when such proofs are taken to examine the witnesses, and to offer counter proofs, which shall also be received by the committee and reported to the House; that if the proofs, so to be reported, shall be declared by the House insufficient to verify the material facts stated in the petition, or such other facts as the House shall deem proper to be inquired into, it will then be necessary for the House to direct a further inquiry, especially the procuring whatever additional testimony may be supposed to be in South Carolina, as the case may require; that all questions arising on the proofs be decided by this House, without any previous opinion thereon reported by a committee.

The report having been considered on April 29, and amended by the House to read as above shown,[5] it was—

> *Resolved,* That this House doth agree to the said report, and that it be an instruction to the Committee of Elections to proceed accordingly.

On May 16[6] a yea-and-nay vote occurred in the House and Mr. Smith is recorded as voting, showing conclusively that he had taken the oath while the question as to his qualifications was pending.

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[1] First session First Congress, Journal, p. 12. It is a fair presumption that, Mr. Smith took the oath when he took his seat, as on April 6 the House had agreed on a form of oath which was on April 8 administered to those present. Other Members came in and took seats after that, and undoubtedly took the oath. The record of Mr. Smith's appearance is the same as that of others.

[2] Journal, p. 14.

[3] See section 413 of this chapter.

[4] Journal, pp. 16, 17, 23.

[5] Journal, p. 23; Annals, p. 232; American State Papers (miscellaneous), p. 1. The amendments made by the House are not specified.

[6] Journal, p. 37.

On May 12[1] the committee submitted their report, which was taken up for consideration on May 21. The report[2] stated:

That Mr. Smith appeared before them, and admitted that he had subscribed, and had caused to be printed in the State Gazette of South Carolina, of the 24th of November last, the publication which accompanies this report, and to which the petitioner doth refer as proof of the facts stated in his petition; that Mr. Smith also admitted that his father departed this life in the year 1770, about five months after he sent him to Great Britain; that his mother departed this life about the year 1760, and that he was admitted to the bar of the supreme court in South Carolina in the month of January, 1784.

The committee also submitted certain counter proofs, mostly copies of acts of South Carolina.

On May 21 and 22[3] the House considered the report, and in the debate the following facts were stated and admitted:

That Mr. Smith was born in South Carolina, of parents whose ancestors were the first settlers of the colony, and was sent to England for his education when about 12 years of age. In 1774 he was sent to Geneva to pursue his studies, where he resided until 1778. In the beginning of that year he went to Paris, and resided two months as an American gentleman; was received in that character by Doctor Franklin, Mr. Adams, and Mr. Arthur Lee, the American commissioners to the Court of France. In January, 1779, he left Paris for London, to procure from the guardian appointed by his father the means of his return to America. He was disappointed, however, of the expected aid, and was obliged to remain in England till he could get remittances from Charleston. In the interval the State of South Carolina fell into the hands of the enemy, and this rendered it impossible at that time to return. He remained in England, and embraced the opportunity to acquire a knowledge of the English law, but could not be admitted to the practice of it because he had not taken the oath of allegiance to Great Britain, which is a necessary qualification. Having obtained the necessary funds, he left London in October or November, 1782, with a view of returning to America, but avoided taking passage for Charleston, because it was then in possession of the British, but traveled over to Ostend, and there embarked in a neutral vessel for St. Kitts, with the intention of receiving the first opportunity of reaching the American camp. In January he sailed from Ostend, but was shipwrecked on the coast of England and obliged to return to London in order to procure another passage, and was thus prevented from reaching the United States till 1783. That on his arrival in Charleston he was received by his countrymen as a citizen of the State of South Carolina, and elected by their free suffrages a member of the legislature, and was subsequently elected to several honorable posts, and finally, in 1788, to the seat in Congress, which is the subject of this contest.

The constitution of South Carolina was silent as to citizenship; but certain laws had from time to time been passed, both with regard to those absent from the country for purposes of education and with regard to aliens. The constitution also prescribed certain qualifications of residence for those holding certain offices.

It was shown that in Mr. Smith's public career in his own State it had uniformly been assumed that he was a citizen of the State during the time he resided abroad; and no questions were raised, although he was disqualified for some of those positions under the law, if it was to be assumed that he was not a citizen while abroad.

After debate, the House, on May 22, 1789,[4] agreed to the following resolution by a vote of 36 yeas to 1 nay:

Resolved, That it appears to this House, upon mature consideration, that William Smith had been seven years a citizen of the United States at the time cf his election.

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[1] Journal, pp. 33, 39.

[2] Journal, p. 33; American State Papers (miscellaneous), p. 8.

[3] Journal, pp. 39, 40; Annals, pp. 397–408.

[4] Journal, p. 39.

It does not appear that any question was raised in the debate as to the right of the House to decide by majority vote on the title of a Member to his seat should he be found disqualified.

421. The Michigan election case of Biddle v. Richard in the Eighteenth Congress.

An alien naturalized by a State court not expressly empowered by the United States Statutes so to do was yet held to be qualified as a citizen.

A person who had resided in a Territory one year as a person, but not as a citizen, was held to be qualified as a Delegate under the law requiring a residence of one year.

A discussion as to whether or not a Delegate should have the same qualifications as a Member.

The office of Delegate was created by ordinance of the Continental Congress.

On January 13, 1824,[1] the Committee on Elections reported on the contested election case of Biddle *v.* Richard, from Michigan Territory. Mr. Richard was objected to on the ground that he was an alien, his naturalization before a Michigan court being alleged to be invalid; and on the ground, should the naturalization be held valid, he was still disqualified, as the naturalization had not taken place a year previous to the election.

The committee in this case first noticed the subject of the qualifications of a Delegate, and called attention to the fact that the office was not one provided for by the Constitution, but grew out of the ordinance of Congress for the government of the Northwest Territory, passed before the adoption of the Constitution. Neither by the terms of that ordinance nor by the laws of the United States were qualifications required of a person elected Delegate. Unless a rule could be deduced from the principles of the Constitution there was nothing to prevent an alien from holding a seat in Congress as Delegate from a Territory. But the committee expressly disclaim any intention of pronouncing a decision on this point, since the case did not render it absolutely necessary.

The sitting Member had been naturalized in a county court in Michigan, and while the naturalization law of the United States did not in terms include such court among those authorized to naturalize aliens, yet the committee concluded that by implication the intention to authorize such a court was plainly shown.

As to the second objection, it was shown that the law prescribed a residence of one year "next preceding the election" as a qualification needed to make a person eligible to any office in said Territory. Even admitting the office of Delegate to be included in this prescription, it was to be observed that it was not the citizen but the person who was required to reside in the Territory one year. Therefore the committee overruled the objection that the naturalization had not taken place a year before the election.

The committee concluded that Gabriel Richard was entitled to the seat.

On February 2, 1824, the House practically concurred in this conclusion by ordering that John Biddle have leave to withdraw his petition and documents.

[1] First session Eighteenth Congress, Contested Elections in Congress, from 1789 to 1834, p. 407.

422. The Florida election case of David Levy in the Twenty-seventh Congress.

An instance of citizenship conferred by treaty stipulations.

In determining citizenship a committee ruled that the domicile of the father is considered the domicile of the son during the minority of the son if he be under the control and direction of the father.

In 1841–42,[1] the Committee on Elections twice examined the qualifications of David Levy, sitting as Delegate from Florida.

By the treaty ceding Florida to the United States, it was provided:

> The inhabitants of the territories which his Catholic Majesty cedes to the United States by this treaty shall be incorporated in the Union of the United States as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of all the privileges, rights, and immunities of the citizens of the United States.

This treaty was signed February 22, 1819, and ratified February 22, 1821. The majority of the Committee of Elections found that the formal transfer began at St. Augustine on July 10, 1821, and was completed at Pensacola July 17, and that on the latter day Governor Jackson issued his proclamation of American sovereignty, in accordance with the directions of the Government at Washington. The minority of the committee found that East Florida (there being two provinces) was transferred July 10, and preferred that date to July 17.

David Levy was not an inhabitant of Florida on either the 10th or 17th of July 1821. He had been born on the island of St. Thomas (then a possession of Denmark) on June 2, 1810, his father being a subject of the King of Denmark. David Levy came to Norfolk, Va., in 1819, and attended school and worked there until 1827. He did not go to Florida to reside until 1827. It is evident, therefore, that he was not an inhabitant of Florida, in his own right, at the time of the transfer of the Territory.

The committee, in the course of the investigation, adopted the principle "that the domicil of the father is the domicil of the son during the minority of the son, if the son be under the control and direction of the father."

Therefore the question turned on whether or not Moses Levy, father of David Levy, was an "inhabitant" of Florida at the time of the transfer of sovereignty. Moses Levy was born in Morocco, but at the time of the birth of his son was a subject of the King of Denmark. In the early part of 1821 he came to Philadelphia and took out his declaration to become an American citizen. He then went to Florida, and the question turns principally on whether he was there at the time of the transfer, although the minority contended that, not being a subject of the King of Spain, the treaty did not operate on him. In their first report the committee found that Moses Levy was not an inhabitant of Florida at the time of the transfer, and that, had he been, the King of Spain might not have transferred his allegiance to the United States, since he was a Danish subject.

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[1] First session Twenty-seventh Congress, House Report No. 10; Second session, Report No. 450; 1 Bartlett, p. 41; Rowell's Digest, p. 114.

423. The Florida election case of David Levy, continued.

A Delegate who, though an alien by birth, had lived in the United States from an early age, and whose father had been a resident for twenty years, was not disturbed on technical objections as to his citizenship.

The House has the same authority to determine the right of a Delegate to his seat that it has in the case of a Member.

A committee held that the strongest reasons of public policy require a Delegate to possess qualifications similar to those required of a Member.

A committee held that under the principles of the common law an alien might not hold a seat as a Delegate.

A committee denied the binding effect of a decision of a Territorial court on a question of fact concerning the qualifications of a Delegate.

An instance of the admission of ex parte testimony in an election case.

Later additional evidence was presented, and, although objected to by the minority of the committee as inadmissible because taken ex parte, was admitted. This testimony shows, among other things, that Moses Levy was recorded as an inhabitant in a registry established by General Jackson. This proceeding appeared undoubtedly to have been ultra vires; but there was other evidence as to the time of the arrival of Moses Levy in Florida, and the majority of the committee finally concluded that as the Delegate had lived in the United States from an early age, as his father had been a resident of the United States for more than twenty years and had twice taken the oaths of abjuration and allegiance, the "spirit of the naturalization policy of the country" had been fully satisfied. This idea seems to have been of considerable weight in determining the committee to reverse its first report, and decide that Mr. Levy was entitled to the seat. This reversal of conclusion was barely made, four of the nine members of the committee dissenting and a fifth giving only a qualified assent.

The House did not act on the report; but Mr. Levy retained the seat without confirmation of the report by the House, since he had originally been admitted to the seat.

In the course of the consideration of this case the committee came to certain conclusions bearing vitally on the case.

1. It was urged that the House of Representatives had no jurisdiction to try or determine the eligibility of a Territorial Delegate. The committee concluded that the House had plenary authority to investigate and decide upon all questions touching the right of a Delegate to hold a seat in that body. Such authority seemed absolutely essential to the existence of a well-regulated legislative body, which must have the power to prevent the intrusion of improper persons, or guard its own rights from violation. And the House had so determined in many cases from 1794 to 1838.

2. That citizenship was not one of the qualifications of a Delegate in the acts of Congress under which he was appointed; and that, therefore, the House of Representatives could not make it a test of eligibility. The committee agreed that while the original ordinance of 1787 for the government of the Northwest Territory was silent in reference to the qualifications of a Delegate, yet must have assumed certain

ones. While not strictly or technically a Representative, yet, considering the dignity and importance of the office, the strongest reasons of public policy would require that he should possess qualifications similar to those required by a Representative. Even if the letter and spirit of the Constitution might not give light, yet the well-settled principles of common law would prevent an alien from holding a seat in the House of Representatives. Chancellor Kent had enunciated the proposition that an alien might not hold any civil office, or take any active share in the administration of the Government. The committee therefore were confident that an alien might not exercise the office of a Delegate to Congress.

3. That the rights of David Levy under the treaty had been the subject of recent adjudication by the highest judicial tribunal of Florida, constituted of judges appointed and commissioned by the United States Government, and that such adjudication, if not conclusive, was persuasive evidence, and that the committee ought not to look behind it. The committee denied that the court in question was one of concurrent jurisdiction, or that the decision in question was directly upon the point. Furthermore, it was not between the same parties.

424. The Indiana election case of Lowry v. White in the Fiftieth Congress.

A Member who had long been a resident of the country, but who could produce neither the record of the court nor his final naturalization paper, was nevertheless retained in his seat by the House.

The House, overruling its committee, admitted parol evidence to prove the naturalization of a Member who could produce neither the record of the court nor his certificate of naturalization.

Determination by a divided Elections Committee that the disqualification of a sitting Member does not entitle the contestant, who had received the next highest number of votes, to the seat.[1]

On January 30, 1888,[2] Mr. F. G. Barry, of Mississippi, from the Committee on Elections, submitted the report of the majority of the committee in the Indiana case of Lowry *v.* White. The sitting Member had been returned by a majority of 2,484 votes over contestant, and also a clear majority of all the votes polled at the election.

The questions of importance in this case all arose out of the alleged disqualification of the sitting Member, it being alleged that he had not been on the 4th of March, 1887, a citizen of the United States for a period of seven years prior thereto, as required by the Constitution.

(1) The majority state the first question:

(1) Was the contestee a naturalized citizen of the United States, and.had he been for seven years previous to the 4th of March, 1887, and if he was, can he prove that fact by parol?

The majority report thus answers this question:

The second paragraph of section 2, Article I, of the Constitution of.the United States says:

"No person shall be a Representative who shall not have attained the age of twenty-five years and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen."

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[1] See also Section 417 of this volume for reference to an elaborate discussion of this point.

[2] First session Fiftieth Congress, House Report No. 163; Mobly, p. 623.

In the eighth section of the Constitution of the United States power is conferred on Congress "to establish an uniform rule of naturalization." This power is exclusively in Congress. (2 Wheaton, 269.) The existing legislation of Congress on that subject is contained in the thirty-third chapter of the Revised Statutes, 1878.

It is admitted that contestee is a native of Scotland, and that he arrived in the United States on the 8th of August, 1854. Your committee believe that in claiming to be a naturalized citizen of this country he fails to bring himself within the provision of said statute. His original status is presumed to continue until the contrary be shown. (Hauenstein *v.* Lynhom, 100 U.S., 483.) In the opinion of your committee contestee has failed to remove this presumption.

It is proven and not disputed that contestee went through the final forms of naturalization and admission to citizenship at Warsaw, Kosciusko County, Ind., on Monday, November 1, 1886, in a court of record, on the ground that the doctrine of relation might apply to his declaration of intention which is duly entered of record on the 24th day of July, 1858, in the circuit court of Allen County, Ind.

To say the least of it, this is an unfavorable admission on the part of the contestee. It is not contended by the learned counsel that the doctrine of relation will apply in this case. Contestee, however, claims to have been admitted to citizenship in the court of common pleas of Allen County, Ind., on February 28, 1865, which is the vital point of contention in this case.

It is admitted that there is no record of such proceedings, nor a trace of such a record in any court; but contestee now claims that a certificate of naturalization was then issued to him which he can not now produce, nor does he or any one know what became of it.

If contestee were naturalized in February, 1865, can he prove it by parol? A thorough examination of the authorities convince your committee that he can not. Contestee, in his brief, holds that parol evidence may be received to prove the fact of naturalization; that it is the oath of fidelity to the Government which makes an alien a citizen, and that fact can be proven by parol in the absence of the record of the court.

There are set forth in the printed record of this case contemporaneous entries of naturalization in said Allen County, which are claimed by contestee to be in duplicate of the certificate issued to naturalized persons about the period he claims to have been naturalized, and from this it is assumed by contestee he held such a certificate.

Whatever weight might be given to this alleged missing certificate, even if produced in evidence, it is unnecessary to discuss, and we forbear an opinion on that. It is sufficient to say that such an attempt to prove it or its contents is a species of evidence too speculative and inferential to be entertained, especially when it is sought to establish the solemn proceedings of a court of record. No authority in support of such a rule of evidence has been furnished this committee, and we do not think there is one in existence.

As the able counsel for the contestee tersely stated the proposition in their brief, "Can parol evidence be received to prove the fact of naturalization?" We answer, it can not; certainly not in the absence of any record whatever, or even a certificate of naturalization, as is admitted in this case. The authorities therein cited to the effect that the contents of a lost record may be proven by parol, is a principle too familiar to discuss. But we have not found a single adjudicated case in which oral evidence is admitted to prove a record which never existed.

Not one witness testifies to having read the alleged certificate, and none but contestee says he ever saw it, and he does not attempt to state its contents. There are only two witnesses, Isaac Jenkinson and William T. Pratt, who profess to have been present at the alleged naturalization of contestee in February, 1858, besides the contestee himself. Pratt says nothing of seeing such certificate, and Isaac Jenkinson says:

"I have no recollection of any papers being drawn up or signed or sworn to on that occasion." (Record, p. 190, question 41.)

In Shaeffer *v.* Kreutzer (6 Binn., 430), which is relied on by contestee, Justice Yates says:

"It [the verdict] is no evidence of the fact having been legally decided, for the judgment may have been arrested and a new trial granted. Here a former action of ejectment was brought for the same land by persons to whom the present parties are privies, and the verdict given therein was offered to introduce the collateral fact of payment of the cost of that suit, and to account for the defendant in this action coming into possession, and of the plaintiff's acquiescence in the adverse title."

Contestee also relies on Campbell *v.* Gordon. (6 Cranch, 176.) This was a bill to rescind contract for sale of land. There was a memorandum on the minutes of the court as follows:

"At a district court held at Suffolk, William Currie, native of Scotland, migrated into the Commonwealth, took the oath, etc."

There was also a certificate of naturalization of appellee's father. Judge Spears, in discussing that case, said not only the certificate of the clerk but the minutes of the court were produced; besides, the certificate had appended to it these words: "A copy: test, Jno. C. Littlepage," who it appeared in evidence was clerk. (See Green's Son, Federal Reporter, July, 1887, vol. 31, p. 110.)

In Dryden *v.* Swinburne the court discusses the case of Campbell *v.* Gordon at length, and says:

"When the court say, 'The oath when taken confers upon him the right of citizenship' it is obvious that they meant when the record showed the oath was taken it would suffice, and it would be presumed that it was not administered, or at least an entry was not made of it, till all the other requisites of the statutes were complied with. It would be an utter distortion of this language and decision to hold that the taking of the oath by parol testimony, when the record was produced, and it failed to show any naturalization or attempt at naturalization." (Dryden *v.* Swinburne, 20 W. Va., 125. See also 18 Ga., 239.)

Any other construction would be in direct violation of the Revised Statutes of the United States upon the subject of naturalization. Section 2165 says:

"An alien may be admitted to become a citizen of the United States in the following manner, and not otherwise:"

It subsequently says, "which proceedings shall be recorded by the clerk of the court." It distinctly provides that the naturalization proceedings must be in a court of record. Hence Justice Marshall says:

They [the courts of record] are to receive testimony, to compare it with the law, and to judge of both law and fact. The judgment is entered on record as the judgment of the court. It seems to us, if it be in legal form, to close all inquiry; and like every other judgment, to be the complete evidence of its own validity."

In this extract that great jurist was discussing the proceedings in naturalization.

Contestee relies also on Stark *v.* Insurance Company (7 Cranch, 420). This was an action of covenant upon a policy of insurance. The goods insured were warranted to be American property. The record entries are complete, with a formal judgment of admission to citizenship, but fail to show that Stark, the naturalized alien, had filed a previous declaration of intention. It was held that the judgment was conclusive as to antecedent matters in the cause.

Contestee also cites 91 United States Reports, page 245 (Insurance Co. *v.* Tesdale). Suit was brought by plaintiff, who was administratrix of her deceased husband, in her individual character, against defendant, upon a policy of insurance on the life of her husband. The sole question was, could letters of administration be admitted to prove the death of a third person where the right of action depends upon the death of such person; and the court held that it could not be done.

The question of naturalization was in no way involved, but the court says, incidentally, that a certificate of naturalization is good against all the world as a judgment of citizenship, from which may follow the right to vote and hold property; but it can not be introduced as evidence of residence, age, or character. (91 U.S.R., 245.)

Mr. Calkins, in his very able and ingenious argument before the committee, relied with great emphasis on the case of Coleman on habeas corpus (15 Blatchford, 406), in which the court says, speaking of the Revised Statutes concerning naturalization proceedings:

"The provisions for recording proceedings at the close of the second condition and the provisions for recording the renunciation mentioned in the fourth condition are introduced in such form that they may very well be regarded as merely directory."

This was a criminal proceeding, highly penal in its nature, the offense with which Coleman was charged being a felony, under Revised Statutes of the United States, section 5426.

Coleman held a certificate of naturalization, and the only question presented was: (1) Had the certificate been unlawfully issued or made; and (2) did Coleman know that when he so issued it?

Coleman was arraigned for having so used said certificate for the purpose of registering himself as a voter, knowing it was unlawfully issued. There were papers on file in the clerk's office, from whence the certificate issued, setting forth the necessary proceedings of Coleman's naturalization. His name was also entered in the naturalization index. The certificate was signed by the clerk of the superior court, attested by the seal of the court, certifying that the copy, before set forth, of the entry in regard

to Coleman in such naturalization index, "is a true extract from the record of naturalizations of this court, remaining in my office to date."

Judge Blatchford held that Coleman was duly and legally admitted to citizenship, and that he should be discharged.

It can not be contended that in a matter so highly penal any evidence that would go toward acquittal would be sufficient to establish citizenship and clothe an alien with all the political powers and privileges of a citizen. What would be sufficient in one case might be wholly insufficient in the other.

In such a prosecution the criminal intent or the guilty knowledge of using an unlawful certificate would be the governing question. In such a case even a reasonable doubt would discharge the defendant. A naturalized citizen is a mere creature of the law. He derives his existence as such from the law, and if he fail to follow its essential provisions he can not be clothed with those high privileges such a law confers.

But the court says in the Coleman case that propositions are announced the accuracy of which can not be questioned—such as the admission of an alien to citizenship is a judicial act (15 Blatchford, p. 420)—and at furthest the partial committal of the court in the Coleman case, that the statute requiring the record or proceedings may very well be regarded as directory, can only be considered as a dictum, as it was held in that case there was complete and sufficient record of naturalization.

Contestee also relies on 7 Hill, N. Y., 137–141, but in that case, it will be observed, the court says:

"The proceedings of naturalization are strictly judicial (p. 138). The right of citizenship is finally conferred by the judgment of the court (p. 141)."

He also cites McCarty *v.* Marsh (5 N. Y., 263) as liberal to the naturalization of foreigners.

In that case Justice Foot says:

"The simple question, then, is whether the record is conclusive evidence of the fact that a prior declaration of intention was made in due form of law. The weight of authority is decidedly in the affirmative. (Citing 6 and 7 Cranch, supra, Spratt *v.* Spratt, 4 Peters, and a large number of cases.)"

Contestee also relies on the case of *The Acorn* (2 Abbott, U.S. Reports, p. 434) as liberal concerning the naturalization of foreigners. This was a libel of information and seizure for forfeiture for alleged violation of registry laws. One of the causes alleged is, that when David Muir took the oath he was not a citizen of the United States, as his oath alleged.

Muir introduced in evidence an exemplified copy of the record of his naturalization. So far as the question of naturalization is concerned in that case, Judge Longyear decided that the judgment naturalizing Muir was conclusive as to the preliminary proceedings necessary to give the naturalizing court jurisdiction—a familiar principle that runs through all adjudicated cases on that point. This judge also says in his opinion:

"The proceeding to obtain naturalization is clearly a judicial one. (Ibid., p. 444.)

"A hearing is required to be had in open court, and the right can be conferred only by the judgment of the court, and upon satisfactory proof. (Ibid., p. 444.)"

Contestee relies in his brief on the following extract from Morse on Citizenship, page 84:

"In case of an individual claiming to be a citizen by naturalization, the certificate or letter of naturalization is the usual and orderly proof which is offered, but is not exclusive. If the letter or certificate is lost and the record can not be discovered, secondary evidence to establish citizenship would be admissible. (Citing Field's International Code, p. 136, note, and the opinion of Attorney-General Black, vol. 9, p. 64.)"

The last-named author, under the subject of allegiance, cites Attorney-General Black, who simply says:

"The fact of renunciation is to be established like any other facts for which there is no prescribed form of proof by evidence which will convince the judgment."

This was a case of a Bavarian, once naturalized here, claiming renunciation of his citizenship as a citizen of this country; and how and where the author of the above quotation got his law your committee are at a loss to determine. In international affairs such a principle might apply, when the question of citizenship is a matter of dispute and the liberty or property of a subject are involved. But there are no authorities holding such a doctrine in this country when an alien, claiming to be naturalized, seeks to establish that fact by parol proof.

The case of Dryden *v.* Swinburne (22 W. Va.) is a remarkable parallel case to this in all of its salient features. Judge Green in that case, in an elaborate opinion, discusses the subject in the most learned manner.

The following extracts from the syllabus in that case is a clear statement of the decision on this point:

"The law requires that an alien should be naturalized in a court of record, and his admission to citizenship must be a judgment of such court; and therefore if it is claimed in any case that an alien has been naturalized in a certain court, and it be shown, that if naturalized at all, he was naturalized in that court, and the records of such court are produced, and an examination of them shows that no entry was made on the records of such court naturalizing such alien, it can not be proven by parol evidence that he was admitted to citizenship in such court, but that by inadvertence, or any other reason, there was no entry made of it; nor can the citizenship of an alien, under such circumstances, be presumed by proof of his having held real estate or of his having voted or held office or by other circumstances."

The same doctrine is announced in the case of Chas. Green's Son and others *v.* Salas (3 Federal Law Reporter, July 26, 1887); also in Rutherford *v.* Crawford (53 Ga., 138).

In these last two cases a certificate was presented by the persons claiming to have been naturalized, which was held insufficient in each.

In Andrews *v.* Inhabitants of Boylston (110 Mass., 214) it is held, if the records of a town meeting fail to show a two-thirds vote to reestablish a school-district system, parol evidence is inadmissible to show it, even though the record shows that the town voted to reestablish the school-district system.

The omission in a record can not be supplied by parol proof. (2 Pickering, 397.)

The court says "it would be dangerous to admit of such.proof." (2 Pickering, 397. See also 125 Mass., 553; 117 Mass. 469; 58 Iowa, 503; Wharton's Evidence, 987; 18 Maine, 344; 3 Blackford, 125; 23 Maine, 123.) '

In Slade *v.* Minor (2 Cranch, Circuit Court Reports, D. C., 139), the point was distinctly presented, and the case was decided upon it, in which the court held that the naturalization of Charles Slade could not be proved by parol.

Certificates of naturalization issued by the clerk of a court, without any hearing before the judge in open court, are void, and confer no right of citizenship upon the holder. (McCrary on Elections, see. 56.)

Starkie in his work on evidence, page 648, says:

"In the first place, parol evidence is never admissible to supersede the use of written evidence where written proof is required by law. Where the law, for reasons of policy, requires written evidence, to admit oral evidence in its place would be to subvert the rule itself.

"To admit oral evidence as a substitute for instruments to which, by reason of their superior authority and permanent qualities, an exclusive authority is given by the parties, would be to substitute the inferior for the superior degree of evidence; conjecture for fact, and presumption for the highest degree of legal authority; loose recollections and uncertainty of memory for the most sure and faithful memorials which human ingenuity can devise or the law adopt; to introduce a dangerous laxity and uncertainty as to all titles to property, which, instead of depending on certain fixed and unalterable memorials, would thus be made to depend upon the frail memories of witnesses, and be perpetually liable to be impeached by fraudulent and corrupt practices."

And he thus lays down the rule:

"In the first place, written evidence has an exclusive operation in many instances, by virtue of peremptory legislative enactments. So it has in all cases of written contracts. So also in all cases where the acts of a court of justice are the subject of evidence. Courts of record speak by means of their record only, and even where the transactions of courts which are not, technically speaking, of record, are to be proved, if such courts preserve written memorials, are the only authentic means of proof which the law recognizes."

Wharton, in his Law of Evidence, section 1302, says:

"A court of record is required to act exactly and minutely, and to have record proof of all its important acts. If it does not, these acts can not be put in evidence."

The proceedings of a court of record can be shown only by the records, unless they are lost or destroyed. (Rutherford v. Crawford, 53 Ga.)

The minority views, signed by Mr. J. H. Rowell, of Indiana, and five other members of the committee, held:

It is contended by contestant, and held by the majority of the committee, that no matter what the fact is, unless there is a record remaining in the court, or unless there was a record made and retained

from which a transcript could be made, parol proof is not admissible to establish the fact of naturalization and of the issue of a certificate thereof.

It is claimed that no naturalization is complete so as to invest the applicant with citizenship until a record of the proceeding is made in the court where the judgment was rendered and the oath administered.

We hold the law to be that parol testimony is admissible to prove naturalization under circumstances such as are shown to exist in this case.

We hold further that the making out of a certificate of naturalization, reciting all the requisite facts, under the seal of the court, is an entry of record of the proceedings, even though that certificate is carried away from the court, instead of being left with the clerk.

We hold that, having done all that the statute requires of him, and having obtained his certificate of naturalization in due form, with all proper recitals from a competent court, the person is, from that time invested with citizenship without reference to any further act to be performed by the clerk of the court.

We hold that the certificate so obtained is original evidence and conclusive of citizenship in all collateral proceedings, without proof of any record remaining in court and whether such a record exists or not.

The minority quote Morse on Citizenship, the case of Acorn (2 Abb. U. S. Reports, 434–437), Wharton's International Law Digests (sec. 174), Campbell *v.* Gurden (6 Cranch, 179), Stark *v.* Insurance Co. (7 Cranch, 420), Insurance Co. *v.* Tesdall (91 U. S. Reports, 245), In re Coleman (15 Black, 406), and after discussing these cases say:

There can be no doubt that parol proof is admissible to establish the contents of lost deeds and papers and records. (Greenleaf on Ev., vol. 1, sec. 509; Whalen's Ev., vol. 1, sec. 136; Wood's Prac. Ev., see. 7 et seq.; Ashly *v.* Johnson, 74 Ill., 392.)

Had contestee been able to produce this certificate, would anyone venture to question his citizenship? And yet the case stands in proof precisely the game as if he had done so. Everything necessary to admit parol proof of existence and loss of certificate was given in evidence. (Record, p. 256.) The book of blank certificates in use in the court at the time is in evidence. (Record, pp. 214, 272–273, 383.)

Contestee proved that he was in fact naturalized; that no other record of the proceedings was made so far as could be ascertained than the certificate issued to him; that he received his final certificate; that it is lost; that he is the identical person who was naturalized, and the contents of certificates universally in use at that time. By just such proof the courts of the country are constantly ascertaining the contents of lost papers involving the title to property; the contents of most solemn records are so proven.

Life and liberty are put into the scales upon the same kind of proof. If every other right of the citizen may be thus established, we are at a loss to know why this contestee is to be deprived of like rights and like application of unquestioned rules of law.

He was chosen to the Congress by the very emphatic voice of the legal voters of his district. He has for more than thirty years been an inhabitant of the country, deporting himself in such a way as to meet the approval of his fellowmen.

For more than twenty years he has been recognized as a citizen of the United States, and as such was chosen a Representative to the Fiftieth Congress from the Twelfth Congressional district of Indiana.

If the report of the majority of the committee is to be sustained, an unparalleled injustice will be done to those who elected him and to contestee himself; not because of any fault or neglect on his part, but because of the neglect of a clerk who is proven to have been negligent of duty and careless of the rights of others.

Courts will invoke the aid of technical rules to prevent gross injustice, but it is the boast of all modem courts that mere technical rules of law are not permitted to stand in the way of doing equal and exact justice, unless of such rigid character and so firmly embedded in the law as to compel adhesion to them. Doubts on such questions are always resolved in favor of justice and against wrong.

The majority of the committee have adopted a rule which, while some authority may be found in favor of it, is rejected by other and weightier authority—a rule opposed to sound reason and the best canons of construction.

They have invoked this bare technicality not to prevent wrong, but to enable the House to commit an outrage upon the rights of contestee and the people of his district.

(2) The second question:

(2) If he can prove it by oral evidence, does the testimony disclose sufficient proof to establish that fact?

The majority review the parol proof and give arguments to show its fragile character.

The minority consider it sufficient, and thus review it:

Contestee is a native of Scotland. He came to this country in 1854, and has been a resident of the State of Indiana almost continuously since 1857, most of that time in the city of Fort Wayne, his present home. He was a captain in the Thirtieth Regiment of Indiana Infantry Volunteers and was dangerously wounded at the battle of Shiloh.

In 1858 he declared his intention to become a citizen of the United States, as appears of record in the clerk's office of Alien County, Ind., the certificate issued to him having been lost.

In February, 1865, about the 28th of that month, he appeared in the court of common pleas of Allen County, Ind. (a court having common-law jurisdiction, a clerk and a seal), and produced two credible witnesses in open court, viz, John Brown and Isaac Jenkson, who were also sworn in open court as his witnesses to complete his naturalization. He took the oath of allegiance to the United States and of renunciation, which was administered to him by the judge of the court.

The clerk then and there issued to him a final certificate of naturalization, under the seal of the court, the contents of which certificate is shown by the proof of the only form of final certificates used in that court. This certificate with other important papers of contestee has been lost, as conclusively shown by the evidence.

The clerk of the court negligently omitted to receive the oath of allegiance and its recitals, but gave to Mr. White the record of the proceedings then made in the form of a certificate of naturalization, such as is usually issued to foreigners on being naturalized, and almost universally accepted as conclusive evidence of citizenship.

On pages 286, 287, and 288 of the record will be found a list of about one hundred and fifty persons naturalized during the years between 1860 and 1870 in Allen County, of which naturalization the only record remaining is a duplicate of the certificate issued to the person naturalized, from which it appears that the common way of recording naturalization proceedings in those courts was to make duplicate certificates, reciting all the facts necessary to complete naturalization, signed by the clerk and sealed with the seal of the court, retaining one in the clerk's office and giving the other to the person naturalized.

In some cases the clerk neglected to fill up the duplicate blank kept in the office, only filling out one blank and giving that to the person so naturalized, such certificate being the only record made by the clerk.

As showing the negligent manner of keeping the records by the clerk of that court, the evidence discloses several instances of making a record of naturalization years after the fact.

This same clerk was in the habit of writing up judgments in divorce cases when the minutes of the judge did not show that any divorce had been granted, and in four or five cases records were found written up in which the several cases had not been even docketed, in which there was nothing to show that such divorces had ever been granted by the court.

In addition, it is proper to state that many other persons are similarly situated. Persons who claim to have been in fact naturalized in Allen County, who have moved away, have frequently written and in some cases returned to get proof of citizenship and found no trace of a record.

The fact of Mr. White's naturalization in the courts and at the time claimed is established to a moral certainty. See testimony of Isaac Jenkins (R., pp. 187–195), of James B. White (R., p. 229), and of William T. Pratt, Democratic sheriff at the time (R., p. 196). The testimony is positive,

specific, uncontradicted, and unimpeached. Its conclusiveness will hardly be questioned by any fair-minded man. The absence of a record remaining in the clerk's office in no way casts a doubt upon it, taken in connection with the evidence of the unreliability of these records as kept by the clerk, or rather by the deputy.

Mr. White has passed all the years of his manhood in this country. He has made the greatest sacrifice that one can make for his country—the offer of his life in its defense. He has held office in the city where he resides, and has established such a character that his fellow-citizens elected him to Congress by nearly 2,500 plurality in a district where the party with which he affiliates is in the minority by some 3,000.

Thousands of foreign-born citizens are in like situation with him, the evidence of their citizenship resting upon duly authenticated certificates issued by competent courts and without complete records thereof remaining.

Many of them hold responsible positions in public life; all of them exercise the right of suffrage at every recurring election. Large property interests depend upon their citizenship.

It may safely be said that the right to seats in the House of many Members depends upon the validity of citizenship Testing upon just such evidence.

In the debate the majority laid stress on the fact that neither the record of the court nor the naturalization papers could be produced.

(3) The conclusion which the majority proposed raised another question:

(3) If contestee is ineligible, is contestant, having received the next highest number of votes, entitled to the seat?

We answer the first in the negative.

The majority say:

Now, with regard to the last proposition, of seating contestant.

The universal weight of authority in the United States and the numerous decisions in both branches of the Congress thereof render an extended discussion on this point quite unnecessary. With the exception of the State of Indiana, where the rule is established by the supreme court, holding that, where a candidate who receives the highest number of votes is ineligible, the candidate receiving the next highest number of votes is entitled to the office, there is perhaps not another State in the Union where such a doctrine prevails.

The authorities cited by contestant which discuss the control of suffrage as residing in the States, subject to the limitation imposed in the fifteenth amendment of the Federal Constitution, in our opinion, wholly fail to establish his position, that the issue on this point stands and appends wholly upon Indiana law.

To suffer a Member to be seated from one State in pursuance of this view and forbid the same right on the part of a Member from another State would destroy that equality and harmony in the membership of our National Legislature which the founders of our Government obviously intended to establish.

The Federal Constitution says the Members of the House shall be chosen every second year by the people of the several States, and that the electors of each State shall have the qualifications requisite for electors in the most numerous branch of the State legislature.

It is a cardinal idea in our political system that this is a people's government and that the majority rule. In the convention which framed our common Constitution, when it was proposed to strike out people in the clause above referred to, and insert legislatures, thus giving the legislatures the power to elect Representatives, there were only three votes in the affirmative and eight in the negative. On the final vote only one State voted in the affirmative, one was divided, and nine in the negative.

Mr. Jefferson considered that a wholesome provision in our organic law on the ground that the people should be taxed only by Representatives chosen by themselves. It is true that article 4, section 1, of the Constitution of the United States says, "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State," and that Congress may enact the necessary laws thereunder.

This was chiefly intended to give the same conclusive effect to judgments of all the States and

equal verity to the public acts, records, and judicial proceedings of one State in another, so as to promote uniformity, as well as certainty, among them. (See Story on the Constitution, sec. 1307.)

This author adds:

"It is, therefore [a foreign judgment], put upon the same footing as a domestic judgment; but this does not prevent an inquiry into the jurisdiction of the court in which the original judgment was given to pronounce it or the right of the State itself to exercise authority over the persons or the subject matter. We think it can not be assumed under this clause of the Constitution, to hold full faith must be given to the opinion of every State judge on mere matters of law; but to the record the judicial proceedings of a State court, whether made as the result of right rulings or wrong, that, where properly authenticated, such record would be held conclusive as to its own identity."

Judge Cooley announces the law to be in this country, that if the person receiving the highest number of votes is ineligible, the opposing candidate is not elected and the election fails.

The report then cites the Congressional cases supporting this view.

The view taken of the case by Mr. Rowell and his minority associates did not render a decision of the question necessary; but Mr. J. H. O'Neill, of Massachusetts, filed individual views:

That the qualification of a Member of Congress—his eligibility—depends upon the Federal Constitution and the laws of Congress passed in pursuance thereof.

That the election of a Member depends upon the voters of the district he represents, expressing themselves in the way prescribed by the constitution and laws of the State from which he comes. To ascertain whether eligible or not, we look to the Constitution and laws of the United States; to ascertain whether elected or not, we look to the constitution and laws of the State whose electors send him to Congress.

Recognizing the first proposition, the majority of the committee have found and report that the contestee does not possess the qualifications prescribed. Disregarding, however, the second proposition, the committee report adversely to the right of contestant to the place to which, under the laws of Indiana, and by the voice of the electors of the Twelfth Congressional district of said State, legally expressed, he was duly elected. In that State the rule of law, as held by a long and unbroken line of authority, by the courts of last resort and in the halls of the legislature, the principle is well settled that every vote given by an elector to an ineligible candidate counts for naught; that such vote is ineffectual to elect or to defeat. In one of the early cases in that State, the supreme court of the State say:

"While it is true that the votes of the majority should rule, the tenable ground appears to be that if the majority should vote for one wholly incapable of taking the office, having notice of such incapacity, or should perversely refuse or negligently fail to express their choice, those, although in a minority, who should legitimately choose one eligible to the position should be heeded. * * *

"True, by the constitution and laws of the State, the voice of the majority controls our elections, but that voice must be constitutionally and legally expressed. Even a majority should not nullify a provision of the constitution or be permitted at will to disregard the law. In this is the strength and beauty of our institutions. (Gulick *v.* New, 14 Indiana, p. 93.)"

In the case Gulick *v.* New, supra, the court places the impotency of the votes upon the question of notice to the voter of the ineligibility of the candidate for whom the voter casts his ballot. Later cases refer to want of force in the vote without referring to the question of notice. But without referring to those cases, it is here asserted that—

"The legal presumption in favor of the nationality of birth, or domicile of origin, continues until proof of change; that in the absence of proof that an alien has become a citizen of the United States his original status is presumed to continue. (Howenstine *v.* Lynham, 100 U. S. Reports, p. 483.)

"A disqualification patent or notorious at once causes the votes given for the candidate laboring under the disqualification to be thrown away. The same would probably be held to be the case where the electors had the means of knowledge or might have ascertained the facts had they desired. (Grant on Corporations, p. 208.)"

That contestee was of foreign birth, like most foreigners professed of himself, would conclusively show. Then, if alienage is presumed to continue until citizenship is proven, those who voted for him must be presumed to have known. Everyone is bound to know that seven years' citizenship is required of a Member of Congress.

425. The case of Lowry v. White, continued.

In the record of an election case allegations and testimony relating to nominations are out of order.

Personalities and, generally, also digressions on local politics are irrelevant to the record of an election case.

Motions to suppress testimony in an election case already printed under the law were disregarded by the Elections Committee.

An Elections Committee has ruled that the determination of result contemplated by the law governing notice of contest is not reached until returns have been compared or certified as required by law.

The Committee on Elections has apparently acquiesced in the view that a contestant, while bringing into issue no ground that could possibly give him the seat, is yet to be treated as a memorialist, entitled to have the question determined.

Form of resolutions for unseating a Member for disqualifications.

The majority report determines certain preliminary questions, incidental in nature:

(*a*) All of the allegations and testimony relating to the nomination of contestant are foreign to the merits of the case, and are not considered by the committee.

(*b*) A large portion of the printed record in the case is needlessly encumbered with such testimony, ramifying and shaping itself into a multitude of phases with reference to State, county, and Congressional politics. The record is also disfigured with acrimonious personalities between contestant and contestee, that were brought into the testimony and were developed by way of objections to evidence in taking the same—all of which your committee dismiss from consideration as irrelevant to the legitimate issues involved.

(*c*) Motions were filed during the consideration of the case by the committee, by both contestant and contestee, to suppress certain portions of the testimony, but your committee could see no practical purpose in entertaining the same otherwise than is involved in the general consideration of the case, in view of the act of Congress of March 2, 1887, under which the record has been printed and distributed, as required by law, prior to the hearing of the case.

Under the provisions of that statute both parties could have appeared within twenty days, on the notice of the Clerk of the House, and have agreed upon portions of the record to be printed, or should they have failed to agree, it was the duty of the Clerk of the House to decide what portions should be printed.

It is to be hoped this provision of the law will be observed in future, as it will greatly expedite a consideration of contested cases, and relieve both the committee and the House of a great deal of needless labor in investigating the same.

(*d*) The Revised Statutes of the United States, 1878, section 105, require notice of contest to be given within thirty days after the result of an election shall have been determined.

Service was had on the contestee on the 20th day of December, 1886. The contestant swears that he visited the office of the secretary of state of Indiana as late as the 23d or 24th of November, 1886, and that he was informed by that official that the election returns of the district in question had not then been compared or certified as required by law. (See Lowry's testimony, Record, 409.) This is not denied; consequently, in legal contemplation, the result had not been determined, and the contestant was clearly within the statute requiring him to give thirty days' notice.

The minority views also discuss a question which by implication the majority of the committee may also have approved, since they in fact did not favor dismissing the contest:

(*e*) It is urged by contestee that inasmuch as contestant abandoned the only ground of contest which could give him any standing as a contestant for the seat occupied by contestee, the whole pro-

ceeding ought to be dismissed. That even admitting the ineligibility of contestee as charged, contestant has no standing in the case, because, having been beaten at the polls, he can not under any proper view of the case succeed to the seat from which he seeks to oust the sitting Member.

That this would be the rule in judicial proceedings will not be denied. But inasmuch as all the papers in the case were before the committee for their consideration, we are inclined to treat the contestant as a memorialist, and to examine the questions presented for the purpose of reporting our conclusions to the House.

In accordance with their conclusions, the majority proposed two resolutions:

Resolved, first, That James R. White, not having been a citizen of the United States for seven years previous to the 4th of March, 1887, is not entitled to retain his seat in the Fiftieth Congress of the United States from the Twelfth Congressional district of Indiana.

Resolved, second, That Robert Lowry, not having received a majority of the votes cast for Representative in the Fiftieth Congress from the Twelfth Congressional district of Indiana, is not entitled to a seat therein as such Representative.

The minority proposed this resolution:

Resolved, That James B. White was duly elected a Representative to the Fiftieth Congress from the Twelfth Congressional district of Indiana, and is entitled to retain his seat.

The report was debated at length on February 2, 4, and 6,[1] and on the latter day the resolution of the minority was substituted for that of the majority by a vote of yeas 186, nays 105. Then the resolutions of the majority were agreed to as amended.[2] So the recommendations of the majority of the committee were reversed, and sitting Member retained his seat.

426. The case relating to the qualifications of Anthony Michalek, of Illinois, in the Fifty-ninth Congress.

The House considered a protest as to the qualifications of a Member after he had taken the oath without objection.

Form of protest as to the qualifications of a Member.

The House referred a question as to the qualifications of a Member to an elections committee instead of to a select committee.

On December 4, 1905,[3] at the time of the organization of the House, the name of Anthony Michalek appeared on the Clerk's roll among the Members-elect from Illinois. He voted for Speaker and was sworn in without objection.

On December 5,[4] Mr. Henry T. Rainey, of Illinois, claiming the floor for a question of privilege, and being recognized, presented the following protest:

To the honorable the House of Representatives of the fifty-ninth Congress of the United States of America:

The undersigned citizens and legal voters of the Fifth Congressional district of Illinois respectfully represent unto your honorable body that at the last Congressional election held in said district one Anthony Michalek was elected as a Member of the Fifty-ninth Congress; that since said election it has come to the notice of the undersigned that said Anthony Michalek was not at the time he was elected nor is he now a citizen of the United States.

Wherefore we protest against being represented in your honorable body by one who has not deemed it worth while to become a citizen of the United States, and respectfully petition your honorable body

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[1] Record, pp. 915, 947, 988–1001; Journal, pp. 684–686.

[2] The Journal omits to notice that the resolutions as amended were agreed to, but the Record (p. 1001) and subsequent proceedings show that the question was in fact put and agreed to.

[3] First session Fifty-ninth Congress, Journal, p. 3; Record, p. 39.

[4] Journal, p. 68; Record, p. 108.

to cause an investigation to be made, and if it is found that said Michalek is not a citizen of the United States to take such action in the premises as to your honorable body shall seem fit and proper.

And in support of this petition we herewith submit the affidavits of Julius M. Kahn, Enoch P. Morgan, and Joseph Pejsar, which affidavits are made part of this petition, and we offer to produce other and additional testimony on any hearing ordered by your honorable body.

And we will ever pray.

STATE OF ILLINOIS, *County of Cook, ss:*

Julius M. Kahn, being first duly sworn, on oath deposes and says that he is an attorney at law, and resides at 729 East Fiftieth place, in the city of Chicago; that he is a native-born citizen of the United States, and that he is thoroughly familiar with the records of the courts of Cook County, in the State of Illinois, and a competent person to examine the records of the courts; that in said county there are four courts which have the power to naturalize citizens, namely: The circuit court, superior court, county court, and criminal court, and no other court in said Cook County has such power, and that no other court had such power for more than thirty years last past; that he has carefully examined the records of each and every one of said four courts for the purpose of ascertaining whether one Vaclav Michalek ever became a citizen of the United States; that he carefully examined the records beginning with the year 1879 and ending with the year 1890, both inclusive, and that there is no record in any of said courts showing that one Vaclav Michalek became a naturalized citizen during said period of time, and that during all of said period of time no one by the name of Michalek became a citizen in said Cook County, except one Michael Michalek, who became a citizen on March 26, 1888, by naturalization and judgment of the superior court of Cook County; that said Michael Michalek, as appears from said records, was a native of Germany, and not a native of Bohemia, Austria, and that he took the oath renouncing allegiance to the Emperor of Germany.

And this affiant says that after a thorough investigation of the records he finds that Vaclav Michalek was never naturalized in the county of Cook during said period of time.

Affiant further says that under the election laws of the State of Illinois each voter must register and answer under oath certain questions in regard to his qualifications as a voter, and that the record of each voter's answers is kept; that this affiant examined the records so kept in the election commissioners' office in the city of Chicago, County of Cook, and State of Illinois, and finds that Anthony Michalek, Congressman-elect from the Fifth Illinois district, registered in the Eighth precinct of the Eleventh ward in said city in the year 1905, and that his sworn answers to questions propounded were that he, Anthony Michalek, was born in Bohemia, and that he became a citizen of the United States by act of Congress.

And further affiant saith not.

JULIUS M. KAHN.

Subscribed and sworn to before me this 18th day of November, A. D. 1905.

[SEAL.]

EDW. R. NEWMANN,
Notary Public.

STATE OF ILLINOIS, *County of Cook, ss:*

Josef Pejsar, being first duly sworn, on oath deposes and says that he is, and for about thirty-five years last past has been, a citizen of the United States; that he has resided in the city of Chicago for about thirty-nine years last past; that he is a householder and resides, and has resided for more than ten years last past, at No. 3437 Lowe avenue, in the city of Chicago; that he is acquainted with Anthony Michalek, Congressman-elect from the Fifth Congressional district; that the name of the father of said Congressman-elect was Vaclav Michalek; that said Vaclav Michalek was by occupation a brewer; that this affiant was also by occupation a brewer; that both of them were natives of Bohemia, Austria, and that both of them were employed by the Seipp Brewing Company, in the city of Chicago, and that this affiant was well acquainted with said Vaclav Michalek, father of said Congressman-elect; that said Vaclav Michalek arrived in this country in 1879 as an immigrant from Bohemia, and brought said Anthony Michalek-, his son, with him; that he came direct to Chicago, and remained here until the time of his death; that he died in the year 1883, and that he had not been fully five years in this country at the time of his death, and that at the time of his death the said Vaclav Michalek was at least 40 years of age; and that the said Vaclav Michalek had never been in the United States prior to the year 1879. That at an election held in the city of Chicago a few months preceeding the death

of said Vaclav Michalek this affiant had a conversation with said Vaclav Michalek in the Bohemian language, in which conversation this affiant desired said Michalek to become interested in the coming election, and asked him to become a citizen of the United States and make application for his first papers; but that said Vaclav Michalek answered that elections could get along without him, and that he was not and did not care to become a citizen of the United States for some time to come.

And further affiant saith not.

JOSEF PEJSAR.

Subscribed and sworn to before me this 21st day of November, A. D. 1905.

[SEAL.]

ALFAR M. EBERHARDT, *Notary Public.*

STATE OF ILLINOIS, *County of Cook, ss:*

Matous Sedlacek, being fast duly sworn, on oath deposes and says that he is by occupation a brewer; that he is a citizen of the United States, and resides at 630 West Eighteenth Street, in the city of Chicago, Cook County, Ill., and that he has been a resident of the city of Chicago for a period of not less than thirty-four years; that he was born in Bohemia, and speaks the Bohemian language.

Affiant further says that he became acquainted with one Vaclav Michalek about the time and during the same year that said Vaclav Michalek arrived in this country as an immigrant from Bohemia; that said Vaclav Michalek came here with his family, and was the father of Anthony Michalek, Congressman-elect from the Fifth Illinois district; that said Vaclav Michalek worked during his lifetime at Seipp Brewing Company and at Hauck's malt house; that for a period of about three years the said Vaclav Michalek and this affiant worked together and often conversed with each other in the Bohemian language.

Affiant further says that he well remembers the time of the death of said Vaclav Michalek, and that between the time of the arrival of said Vaclav Michalek as an immigrant in this country and the time of his death less than five (5) years elapsed.

And further affiant saith not.

MATOUS SEDLACEK.

Subscribed and sworn to before me this 21st day of November, A. D. 1905.

[SEAL.]

ALFAR M. EBERHARDT, *Notary Public.*

STATE OF ILLINOIS, *County of Cook, ss:*

Enoch P. Morgan, being first duly sworn, on oath deposes and says that he resides at 495 South Hermitage Avenue, in the city of Chicago, Ill.; that he is, and for the past seventeen years has been, a citizen of the United States, and for more than thirteen years last past has been a resident of the city of Chicago; that he is a resident of the Fifth Congressional district and is well acquainted with Anthony Michalek, Congressman-elect from said district; that during the last Presidential campaign this affiant was one of the Republican campaign speakers in the employ of the national committee; that said Anthony Michalek informed this affiant that he, Michalek, was born in Bohemia, and that his father emigrated to this country and brought said Anthony with him when said Anthony was a boy of tender years; that he, said Anthony Michalek, was not a citizen of the United States; that the said conversation took place at the time when said Anthony Michalek was a candidate for Congress at the last national election; that this affiant advised him that it was his duty to at once apply to become a citizen of the United States, and told him that he could obtain his papers easily, because he came to this country when he was under the age of 18 years; and that this affiant informed him that he should not under any circumstances omit to perform that duty at once, or that he would surely get himself in trouble if he voted without being a citizen; that said Anthony Michalek replied that nobody would know anyway, and that it would not make any difference; that one of his relations, who was also not a citizen, had held office, and that he saw no reason why he could not hold office without going to the trouble of taking out his papers, and that nobody would know the difference.

And further affiant saith not.

ENOCH P. MORGAN.

Subscribed and sworn to before me this 18th day of November, A. D. 1905.

[SEAL.]

JULIUS M. KAHN, *Notary Public.*

The memorial having been read, Mr. Rainey offered the following:

Resolved, That the protest of citizens of the Fifth Congressional district of Illinois against being represented in Congress by Anthony Michalek, declared by them to be an alien, be referred to a special committee of five Members of this House, to be appointed by the Speaker, for immediate investigation.

To this Mr. James R. Mann, of Illinois, offered an amendment as follows:

Strike out of the resolution the words "a special committee of five Members of this House, to be appointed by the Speaker, for immediate investigation" and insert "be referred by the Speaker to the appropriate committee of this House when appointed."

Debate followed as to the propriety of the consideration of the subject by an elections committee instead of a special committee, during which Mr. Marlin E. Olmsted, of Pennsylvania, cited the provisions of Rule XI giving the Elections Committees the right to report at any time on the right of a Member to a seat, and Mr. Mann recalled the fact that in the First Congress a question as to qualifications was passed on by the Elections Committee.

After debate the amendment was agreed to, yeas 178, nays 93. Then the resolution as amended was agreed to.

427. The case of Anthony Michalek, continued.

The House authorized its committee to take testimony in a case wherein the qualifications of a Member were impeached.

As to the degree of testimony required to put the burden of proof on a Member whose status as a citizen was impeached.

On January 29, 1906,[1] Mr. H. Olin Young, of Michigan, from the Committee on Elections No. 1, submitted the following report:

The Committee on Elections No. 1, to whom was referred the protest of citizens of the Fifth Congressional district of Illinois, against the right of Hon. Anthony Michalek, elected as a Member of the House of Representatives from that district to the Fifty-ninth Congress, to a seat in the House, on the ground that he was not at the time he was elected a citizen of the United States, beg leave to report and recommend the passage of the following resolution:

"*Whereas*, there is now pending before the House of Representatives a protest alleging that the Hon. Anthony Michalek was not at the time of his election as a Member of this House, and is not now, a citizen of the United States, and therefore is disqualified to be or remain a Member of this House, which protest has been referred to the Committee on Elections No. 1 for investigation: Therefore

"Resolved by the House of Representatives, That said committee be empowered to take such testimony as it deems necessary to a determination of said matter, either before said committee or before a subcommittee thereof or a member of said Committee on Elections No. 1 appointed therefor, or any other person selected by said committee for such purpose, and that the time, place, and manner of taking, certifying, and returning said testimony be determined by said committee, and that the expenses incurred in taking said testimony be paid from the contingent fund of the House upon the order of said Committee on Elections No. 1."

The resolution was agreed to by the House.

On March 6,[2] Mr. James R. Mann, of Illinois, submitted the unanimous report of the committee, which recited the petition protesting against the seating of Mr. Michalek, and said:

The petition purported to be signed by John F. Joyce, 696 West Taylor Street, Chicago, and 124 other persons.

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[1] Journal, p. 356; Record, p. 1698.

[2] House Report No. 2117.

The petition having been referred to this committee, the House, on the 29th day of January, A. D. 1906, passed a resolution authorizing this committee to take testimony in order to determine the right of Mr. Michalek to his seat.

The original petition was supported by the affidavits of Julius M. Kahn, Joseph Pejsar, Matous Sedlacek, and Enoch P. Morgan, which were attached to the petition and formed a part thereof, as presented to the House. The affidavit of Julius M. Kahn did not, on its face, make any case against Mr. Michalek, because it showed that while affiant stated he had made search of the records of certain courts in Chicago, Cook County, Ill., to ascertain whether the father of Mr. Michalek had been naturalized, it also showed that he had made no search for such naturalization in either the United States district or circuit court in Chicago, of which courts this committee necessarily takes notice.

The affidavit of Enoch P. Morgan did not make out a prima facie case against Mr. Michalek, because affiant simply stated what, at the best, would be a conclusion as to citizenship.

The two affidavits of Joseph Pejsar and Matous Sedlacek, however, were to the effect that Mr. Anthony Michalek, the sitting Member, came to this country when he was a minor, with his father, and that the father, Vaclav Michalek, died before he had been in this country a period of five years.

The statements in the affidavits of Sedlacek and Pejsar seem to justify the committee in permitting the protestants to offer evidence in support of their protest, and accordingly such evidence was taken by a member of the committee and by direction of the committee in Chicago.

At the taking of this testimony neither Joseph Pejsar nor Matous Sedlacek was called upon to testify, and it was then, and is now, admitted that the affidavits of these two men were false.

At the taking of the testimony in Chicago not one of the protestants appeared and not one of them testified.

NECESSITY FOR CARE WHEN CHARGES ARE MADE AGAINST THE RIGHT OF A MEMBER OF CONGRESS TO HIS SEAT.

The necessity for care in considering and examining a protest of this character is well exemplified by this particular case. Here are 125 names signed to a protest and on the hearing not one of the persons signing the protest appears to give his reasons for making the protest. The two persons who are principally relied upon by their affidavits to sustain the protest do not appear, and it is admitted that their affidavits are falsehoods. By what right do these 125 men make a statement that a Member of this House is not entitled to his seat and then offer no proof in support of it? Were Mr. John F. Joyce and the other signers of the protest simply dummies who were being used by somebody else? Were they the cat's-paw to pull the chestnuts out of the fire in the interest of someone else?

These persons have trifled with the dignity of this House. They have not even had the manliness to come before the committee at the hearing and state that they were deceived by the false affidavits of Pejsar and Sedlacek. We do not wish to be understood as criticising counsel who appeared for or in support of the position of the protestants. Counsel in behalf of the protestants were engaged as and appeared as lawyers. They presented their case with the utmost fairness and in a manner to maintain their high position as leaders among the great bar at Chicago.

ANTHONY MICHALEK IS FOREIGN BORN.

It appears from the evidence in the case that Anthony Michalek, the sitting Member, came to this country with his father, Vaclav Michalek, and his mother, Therese Michalek, in 1878, when only a few months old.

There are five ways, in any one of which Anthony Michalek might have become a citizen of the United States.

First. By the naturalization of his father, Vaclav Michalek, during the minority of the son.

Second. By the naturalization of his mother, Therese Michalek, after the death of his father, during the minority of the son.

Third. By the marriage of Therese Michalek after the death of Vaclav Michalek to a citizen of the United States during the minority of the son.

Fourth. By the naturalization of Anthony Michalek himself as a person who came here under the age of 18, he having the right under the statute to receive his final papers without taking out first papers.

Fifth. In case his father, Vaclav Michalek, took out his first papers and then died, by compliance on

the part of Anthony Michalek with section 2168 of the Revised Statutes, providing that where a person takes out his first papers and dies his widow and minor children shall be considered as citizens and be entitled to all the rights and privileges as such upon taking the oaths required by law.

It will be seen, therefore, that the sitting Member might have become a citizen by reason of the naturalization of his father or of his mother or of himself. In order to make a prima facie case against him by an examination of the records, it would seem to require an examination as to all three of these persons. There are at least six courts in the city of Chicago, where these persons lived from the time they came into the country, which are authorized by law to issue naturalization papers. These are four State courts and two Federal courts.

To make a prima facie case against the sitting Member it would be necessary to examine the records in each of these six courts for naturalization of Vaclav Michalek, Therese Michalek, and Anthony Michalek. This would make at least eighteen separate examinations of records. As a matter of fact, counsel for protestants offered testimony concerning the naturalization of Vaclav Michalek, the father, in the four State courts. No testimony was offered concerning the naturalization of Vaclav Michalek in the two Federal courts and no testimony was offered as to the naturalization of Therese Michalek or Anthony Michalek in any of the six courts.

The purpose of offering testimony at all concerning records of the courts was to shift the burden of proof from the protestants to the sitting Member. If any testimony be necessary concerning the records in any courts, in order to shift the burden of proof, then it would seem that testimony ought to be offered as to all of the courts, and if it be necessary to offer testimony concerning the naturalization of the father, Vaclav Michalek, it would seem to be also necessary to offer testimony concerning the records as to Anthony Michalek, the sitting Member himself, as well as his mother, Therese Michalek, if it be desired to shift the burden of proof.

While there are six courts in Chicago having the power to naturalize, the law also provides that any person living in Chicago may apply to any court within the State for naturalization.

We think it might be fairly well contended that proof that neither Vaclav Michalek, the father, Therese Michalek, the mother, or Anthony Michalek, the son, was naturalized in any court in Cook County would shift the burden of proof to the sitting Member without requiring the protestants to offer proof as to the many courts in Illinois outside of Cook County, though we do not wish to be considered as expressing any decided opinion upon that question, it being wholly unnecessary for the decision of this case.

It is perfectly manifest in our opinion that if evidence concerning the records of any of the courts as to the naturalization of either the father, the mother, or the son be necessary to effect the shifting of the burden of proof, then it is necessary to offer evidence concerning all of these local courts.

The evidence which was produced relating to the naturalization of Vaclav Michalek in the State courts of Cook County was mainly evidence relating to an examination of the indexes of naturalization and not to an examination of either the actual records or the original applications. Counsel for protestants seemed to admit that an examination of the indexes (not required by law to be kept) might be insufficient to prove the contents of the records, and offered upon the argument of this case in committee, and after the hearing and testimony had been completed, affidavits of various persons connected with the offices of the clerks of the State courts in Chicago concerning the records themselves.

Without expressing any opinion as to the right of the protestants to have these affidavits admitted in evidence without an opportunity on the part of the sitting Member to a cross-examination of the witnesses, we have considered the affidavits as evidence in the case, inasmuch as giving them the weight of testimony has not resulted in detriment to the sitting Member, who was deprived of the opportunity of cross-examination.

The evidence in this case shows that the condition of the naturalization papers and records in Cook County is not very satisfactory; that the indexes have many mistakes in them; that all the original applications for naturalization have not been entered of record as required by the statute, and that the naturalization papers and records have not been kept with that degree of care and accuracy which is presumed to be used in the keeping of ordinary court records and documents. It is not likely that the condition of the naturalization records in Cook County is different from the naturalization records in other large cities. It is well known, and the evidence in this case disclosed the fact, that naturalization of foreign-born persons is often carried on at night, when applicants appear in large numbers and at the suggestion and expense of political committees. The names of the applicants are writ-

ten in the body of the application blanks by the clerks of the courts either from the signature of the applicants or from the pronunciation of their names by themselves. It is perfectly manifest to everyone that under such circumstances many errors creep into the names as written in the body of the applications and afterwards into the records.

In the affidavits filed with the protest in this case the name of Pejsar is not written, where he signs the affidavit, in the same manner as it is written in the body of the affidavit, nor would it be possible for the writer of this report to definitely state from his signature what his name is. The same is true also of the adaffivit and name of Sedlacek. There are a number of signatures attached to the protest presented to the House which it is not possible for a stranger to accurately read.

The Bohemian, Polish, and Russian names are usually not familiar to the average clerk of the court. He does not quickly read the name correctly when written by the applicant in his foreign handwriting.

NO PRIMA FACIE CASE MADE BY PROTESTANTS.

We are of the opinion that the protestants have not made a prima facie case against Anthony Michalek, the sitting Member, by the evidence offered in reference to the naturalization records in Cook County. We are further of the opinion that the evidence of Enoch P. Morgan does not tend to make a prima facie case against Mr. Michalek. The testimony of Mr. Morgan bears upon its face so many evidences of self-contradiction that it is to be looked at with some careful scrutiny before it is accepted as correct. But, reduced to a few words, the evidence of Mr. Morgan, Mrs. Morgan, and their son is to the effect that Mr. Morgan, prior to the election, believed the sitting Member ought to take out naturalization papers himself, on the theory that he could not take a seat in Congress unless he had received a naturalization paper declaring him to be a citizen. It seems evident to us that, even if the conversations as narrated by the Morgans took place, there was a misunderstanding of the meaning of the words "citizen" and "native born." When, according to Morgan, he asked Mr. Michalek if he was a citizen, and Michalek said he was born in Bohemia, and Morgan told Michalek that he must take out his papers and become a citizen and Michalek "laughed," Morgan thought Michalek must take out citizenship papers in person before he could be elected to Congress, and Michalek thought that Morgan believed a man could not be elected to Congress who was foreign born and not native born, and that was not worth discussing.

MICHALEK IS A CITIZEN AND ELIGIBLE FOR MEMBERSHIP IN THE HOUSE.

We find from the evidence in the case, however, that the sitting Member, Anthony Michalek, is and has been for more years than required by the Constitution a citizen of the United States; that the Michalek family came to this country in 1878; that while in this country the father was known as by his Bohemian friends as Waclav or Vaclav Michalek, and by his German friends as Wenzel or Wencl Michalek; that on the 29th day of October, 1884, he applied for and received his first citizenship papers in the county court of Cook County under the name of Wenzl Michalek, as written in the body of the declaration, or Wenel Michalek, as written in the signature; that on August 12, 1885, he made a contract for the purchase of a lot in Chicago, in which contract he was described in the body of the contract as Wenzel Michalek, and which contract he signed as Waclav Michalek; that on March 12, 1887, he made his application for final naturalization in the superior court of Cook County, and by judgment of that court became a naturalized citizen of the United States under the name of Vaclav Michal; that shortly after the issuance of the naturalization papers on March 12, 1887, to Vaclav Michal, the father of the sitting Member, while living on De Koven street in Chicago, voted at the Chicago city election in April, 1887, and that he also voted at the fall election of 1887 while living at 79 Liberty street, to which place he had meanwhile moved with his family.

The mother of the sitting Member, after the death of his father, in February, 1898, was married in Chicago to a man who was presumably then a citizen.

CONCLUSION REACHED FROM PROTESTANTS' TESTIMONY.

The foregoing statements in reference to the naturalization of Anthony Michalek, the sitting Member, by reason of the naturalization of his father and his mother, are based upon the testimony of witnesses called in behalf of protestants.

ADDITIONAL TESTIMONY.

The chief witness for the protestants was Mr. Enoch P. Morgan. Mr. Morgan testified that during the national campaign of 1904 he was in the employ of the Republican national campaign committee as a speaker, and that during the campaign he had several conversations with Hon. James A. Tawney, now chairman of the Committee on Appropriations of the House of Representatives, who was in charge of the speakers' bureau of the Republican national committee, and that he informed Mr. Tawney that Mr. Michalek was not a citizen of the United States.

Mr. Tawney has stated to the committee that no such statement was made to him by Mr. Morgan and Mr. Tawney contradicts Mr. Morgan as to various other statements which Mr. Morgan claims he made to Mr. Tawney.

Your committee is forced to the conclusion that Mr. Morgan in his testimony is somewhat mistaken in his statement of facts.

TESTIMONY OF ANTHONY MICHALEK, THE SITTING MEMBER.

Mr. Michalek requested that he might appear before the committee and make a brief statement as to his position and his claims. Mr. Michalek stated to your committee, under oath, that he was born in Bohemia; that he came to this country with his parents, Vaclav Michalek and Therese Michalek, while an infant in arms that his father died when he was 9 years of age; that he had been informed by his mother and older brothers that his father had become a naturalized citizen and that he grew up in that belief, and immediately upon attaining the age of 21 he registered as a voter in the city of Chicago and has since then always maintained and exercised his right to register and vote; that he has believed for many years and still believes himself to be a citizen of the United States by reason of the naturalization of his father.

CONCLUSIONS.

There never was any proper justification for the protest and charges filed against Mr. Michalek. The persons making the protest did so without knowledge and without evidence. The charges were recklessly made and untruthfully made. They were based upon false affidavits. Proof in the case offered by the protestants makes out a case for the sitting Member instead of the protestants.

SITTING MEMBER NOT CALLED UPON TO ANSWER THE CHARGES.

While the committee, at the request of Mr. Michalek, permitted him to make a brief statement to the committee, yet the committee has not been of the opinion that any prima facie case was made against Mr. Michalek, and hence has been of the opinion that he should not be put to the trouble or expense of proving by witnesses introduced in his behalf his title to citizenship. Your committee is of the opinion that when charges affecting the eligibility of a Member of Congress to his seat are made, some proof should be offered in their support before putting the sitting Member to the expense and the burden of making a defense.

The committee accordingly reported the following resolution, which was, on March 6,[1] agreed to by the House without division:

Resolved, That Anthony Michalek, at the time of his election as a Member of Congress from the Fifth Congressional district of Illinois had attained the age of 25 years, and had then been for more than seven years a citizen of the United States, and was then an inhabitant of the State of Illinois, in which he was elected, and that he was elected a Member of the Fifty-ninth Congress from the Fifth Congressional district of the State of Illinois, and is entitled to retain his seat therein.

428. In 1794 the Senate decided that Albert Gallatin was disqualified, not having been a citizen nine years, although he had served in the war of independence and was a resident of the country when the Constitution was formed.

The Senate by majority vote unseated Albert Gallatin for disqualification after he had taken the oath.

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[1] Journal, p. 600; Record, p. 3399.

On February 28, 1794,[1] the Senate, by a vote of yeas 14, nays 12, voted that the election of Albert Gallatin (who had already been sworn in and was acting as a Senator)[2] to be a Senator of the United States was void, he not having been a citizen of the United States the term of years (nine years) required as a qualification.

It appeared that Mr. Gallatin, who was born at Geneva, January 29, 1761, arrived in Boston July 14, 1780. In October, 1780, he settled at Machias, Me., and resided there a year, furnishing funds for and several times acting as a volunteer with the troops there. In the spring of 1782 he was chosen an instructor at Harvard College, remaining there a year. In July, 1783, he removed to Pennsylvania, and in November of the same year proceeded to Virginia, where he purchased considerable land at two different periods. In October, 1785, he took an oath of allegiance to Virginia. In December, 1785, he purchased a plantation in Pennsylvania, where he resided up to the date of these proceedings. In October, 1789, he was elected a member of the Pennsylvania constitutional convention, and in October of the years 1790, 1791, and 1792 was elected member of the State legislature. On February 28, 1793, he was chosen Senator of the United States.

Mr. Gallatin contended that every man who took part in the Revolution was a citizen according to the great law of reason and nature, and when afterwards positive laws were made they were retrospective in regard to persons in this predicament. He was one of the people who formed the Constitution, being of the body of people who were citizens mutually before the Constitution was ratified.

In opposition it was denied that he was one of the mass of citizens at the time of the adoption of the Constitution; and it was argued that the oath taken in Virginia did not make him a citizen of that State because the Virginia law prescribed other formalities and qualifications which Mr. Gallatin had not satisfied. In Massachusetts, also, certain requirements existed which he had not conformed to. These provisions of the laws of Virginia and Massachusetts were cited as insurmountable barriers in the way of Mr. Gallatin's occupation of the seat.

429. The Senate decided in 1849 that James Shields was disqualified to retain his seat, not having been a citizen of the United States for the required time.

Charges that a Senator-elect was disqualified did not avail to prevent his being sworn in by virtue of his prima facie right.

A Senator was unseated for disqualification after he had been seated on his prima facie right.

On March 5, 1849,[3] at the special session of the Senate, Mr. James Shields, of Illinois, appeared for the purpose of being qualified.

Thereupon a resolution was proposed that his credentials be referred to the Committee on the Judiciary, with instructions to inquire into the eligibility of Mr. Shields to a seat in the Senate.

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[1] First session Third Congress, Contested Elections in Congress from 1789 to 1834, p.851. Journal of Senate, pp. 18, 29, 34, 37, 39, 40.

[2] Journal, pp. 3, 20.

[3] Second session Thirtieth Congress, Journal of the Senate, pp. 353, 357; Globe, Appendix, pp.327–329.

Mr. Stephen A. Douglas, of Illinois, asked that the oath be administered to Mr. Shields, leaving the question as to his qualifications to be decided later. Mr. Douglas contended that Mr. Shields had a prima facie right to the seat, and that in similar cases the oath had been administered, as in the case of Mr. Gallatin, of Pennsylvania, Mr. Smith of South Carolina, and Mr. Rich of Michigan. In a case where the governor of Connecticut had appointed to a vacancy which he had no authority to fill, this fact appeared on the face of the credentials, and the appointee was not sworn in. But in the pending case the certificate showed the election, and Mr. Shields was entitled to the seat until his qualifications were determined.

Mr. John MacP. Berrien, of Georgia, made the argument that the credentials were prima facie evidence of the election, but not of the qualification.

The Senate, without division, agreed to a motion submitted by Mr. Douglas that Mr. Shields be sworn in, and the oath was administered to him.

The Senate then referred to a select committee the subject of the eligibility of Mr. Shields.

On March 13 [1] the committee reported, and the Senate agreed on March 15, after long debate, to a resolution declaring that the election of Mr. Shields "was void, he not having been a citizen of the United States the term of years required as a qualification to be a Senator of the United States at the commencement of the term for which he was elected."

This resolution was adopted without division, it being considered evidently that a majority vote only was required for the passage of the resolution.

430. In 1870 a question was raised as to the citizenship of Senator elect H. R. Revels, but he was seated, the Senate declining to postpone the administration of the oath in order to investigate the case.

In reconstruction days the Senate deemed valid credentials signed by a provisional military governor.

On February 23, 1870,[2] Mr. Henry Wilson, of Massachusetts, presented in the Senate the credentials of H. R. Revels, Senator-elect from Mississippi. These credentials were signed by "Adelbert Ames, brevet major-general, United States Army, provisional governor of Mississippi," attested by "James Lynch, secretary of state" and under the great seal of the State. Moreover—

Mr. Wilson presented a certified extract from the proceedings of the house of representatives of the State of Mississippi; also a certified extract from the proceedings of the senate and house of representatives of the State of Mississippi relative to the election of H. R. Revels as a Senator in Congress.

Mr. Willard Saulsbury, of Delaware, objected that the credentials were irregular, that a "provisional governor" was unknown to the Constitution, and that the interference of an officer in the Army showed that a republican form of government was not existing in Mississippi.

It was urged in support of the credential that it was otherwise proper in form under the seal of the State, and that it had been frequent when new States were admitted for Senators to bear certificates technically irregular as to signature, since

[1] Senate Journal, pp. 361, 365, 366; Globe, Appendix, pp. 332–351; 1 Bartlett, p. 606.

[2] Election Cases, Senate Document No. 11, special session Fifty-eighth Congress, p. 370; second session Forty-first Congress, Globe, p. 1503–1506.

the certificates were frequently signed by a governor-elect, as was the case with the first Nebraska credentials.

The Senate voted, without division, to receive the certificate.

Thereupon Mr. John P. Stockton, of New Jersey, offered the following:

Resolved, That the credentials of Hiram R. Revels, who is now claiming a seat in this body as a Senator-elect from the State of Mississippi, be referred to the Committee on the Judiciary, who are hereby requested to inquire and report whether he has been a citizen of the United States for the period of nine years, and was an inhabitant of the said State at the time of his alleged election in the sense intended by the third section of the first article of the Constitution of the United States, and whether Adelbert Ames, brevet major-general and provisional governor of Mississippi, as appears by the credentials, was the governor of the State of Mississippi at the time, and whether he was an inhabitant of the said State."

This resolution was debated long and learnedly on February 23, 24, and 25.[1] It appeared that Mr. Revels was partially of negro descent, but was born free and a native of the United States. It was asserted that he had voted in Ohio twenty years before this date. It was urged, however, that the States might not naturalize, and that under the Dred Scott decision a person of his descent could not have been a citizen nine years before this date. Mr. George Vickers, of Maryland, thus summarized the argument, speaking of the Dred Scott case:

What were some of the propositions of law decided by that tribunal?

1. That when the Constitution was adopted persons of African descent were not regarded in any of the States as members of the community which constituted the States, and were not numbered among its people or citizens; consequently the special rights and immunities guaranteed to citizens did not apply to them.

2. That no State could by any subsequent law make a foreigner or any other description of persons citizens of the United States.

3. That a State might by its laws put a foreigner, or any other description of persons, upon a footing with its own citizens; but that would not make him a citizen of the United States, nor entitle him to sue in its courts, nor to any of the privileges and immunities of a citizen in another State.

The disqualification of the African race was as radical, fundamental, and perfect as language could make it. This is by a coordinate department of the Government, existing by the same Constitution as Congress; in its origin, design, and objects as thoroughly constitutional; in its powers and jurisdiction superior, because State and national legislation is measured and limited by the Constitution according to its judgment. Its decisions and decrees are as binding as the Constitution itself.

In opposition it was urged that Mr. Revels was born in the United States; that he never had been a slave, and did not conform to the description of negro in the Dred Scott case; that that decision was not authoritative. Mr. John Scott, off Pennsylvania, said:[2]

The history of the litigation that had occurred in various States, and that finally got into the Supreme Court of the United States in the Dred Scott case, is enough to show that a question was made as to whether a colored man was or was not a citizen of the United States. The decisions in Kentucky, the decisions in Connecticut, the decisions in my own State, the discussion which took place upon the admission of Missouri into the Union, the Dred Scott case, the universal discussion of this question at one period in our history—these are enough to show that the public mind was not settled upon the question. But if it was not settled then, could it be more effectively settled than it has been, first by the passage of the civil rights bill, and then, if that was not sufficient as a mere act of Congress to determine the status of citizenship in the face of a decision of the Supreme Court, surely it will not be con-

[1] Globe, pp. 1506–1514, 1542–1544, 1557–1568.

[2] Globe, p. 1565.

tended that the fourteenth constitutional amendment, declaring that all persons born within the United States are citizens, is not sufficient to settle it.

The civil rights bill, if its text be turned to, and the fourteenth amendment, if its text be turned to, will be found to be both declaratory. They do not enact that "from henceforth all persons born within the United States shall be citizens," but the present tense is used in both: "all persons" "are citizens of the United States." If that be sufficient to settle the question, if that be enough as a declaratory law to declare that all persons born within the limits of the United States are citizens of the United States, where does this man stand who now presents himself as Senator-elect from Mississippi?

It is urged by gentlemen on the other side that he became a citizen only by virtue of one or the other of these enactments; but if they turn to the history of that clause of the Constitution of the United States on which they rely they will find that it was inserted both in reference to Senators and to Representatives in the other House of Congress, and also in reference to the President, because of the apprehension that was felt of foreign influences in our Government. In the discussion which occurred in the convention—I have it here, but will not take the time of the Senate to read it—on fixing the qualifications of Senators it was especially dwelt upon that the Senate being the body which was to pass upon treaties with foreign governments, it was particularly necessary that the period of citizenship should be extended and made longer for a Senator than for a Member of the House of Representatives. The discussion of Mr. Madison in the Federalist of this clause shows that the purpose, the reason, the intention of this clause in the Constitution of the United States was that persons who had been born abroad should not be permitted to become Senators until after they bad been citizens a certain length of time. That is the reason, that is the spirit of the law; and it is a maxim which I need not quote, that the reason ceasing the law ceases with it.

Here, then, is a man born in the United States, not an alien, not a foreigner, who comes here elected by a State legislature. No question is raised as to his qualification as to age; no question is raised as to his qualification in any other respect than as to whether he has been a citizen of the United States for nine years. Now, even if the doctrine contended for by the gentlemen on the other side were true, that he was not a citizen until the time of the passage of the civil rights bill or until the adoption of the fourteenth constitutional amendment, still he is not within the meaning of that clause of the Constitution which requires a man to be a citizen for nine years. The meaning, the spirit of that was, that no man should occupy this place who had been naturalized as a foreigner until nine years had elapsed after his naturalization.

On February 25 [1] the resolution of Mr. Stockton was disagreed to—yeas 8, nays 48.

Then on the question of administering the oath to Mr. Revels there were yeas 48, nays, 8.

Accordingly, he appeared and took the oath.

431. Congress has by law prescribed that the Delegates from certain Territories must be citizens of the United States.—The act of May 9, 1872 (sec. 1906, Rev. Stat.), provided—

The Delegate to the House of Representatives from each of the Territories of Washington, Idaho, and Montana must be a citizen of the United States.[2]

432. The Maryland case of Philip B. Key in the Tenth Congress.

Philip B. Key, who had inhabited a home in Maryland a brief period before his election, but had never been a citizen of any other State, was held to be qualified.

Instance wherein the question of qualification was passed on after a Member-elect had been sworn in on his prima facie showing.

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[1] Globe, p. 1568.

[2] See also sections 421, 422 of this chapter.

On October 26, 1807,[1] at the beginning of the Congress, Philip B. Key appeared as a Representative from the State of Maryland and took the oath without question. On November 4 and December 7[2] memorials were presented relating to Mx. Key's qualifications as a resident of his district, and as an inhabitant of Maryland,[3] and on December 7[4] the report found that as to residence in the district there was no law of Maryland requiring such residence. As to his inhabitancy in the State, the committee report facts showing that Mr. Key was a native of Maryland and a citizen and resident of that State at the time of the adoption of the Constitution of 1787; that he was never a citizen or resident of any other of the United States; that in 1801 he removed from Maryland to his house in Georgetown, about 2 miles without the boundaries of Maryland, where he continued to reside until 1806, when, on September 18, he removed with his family and household to a partially completed summer home (intended for himself and not for an overseer), which he was building on an estate in Maryland bought by him in November, 1805, and which was part of an estate owned many years by Mrs. Key's family. Here he was residing October 6, 1806, the date of his election. On October 20, 1806, he removed with his family and household to his house near Georgetown, which he lived in until July, 1807, when they returned to the Maryland house and lived in and inhabited it until October 23, 1807. On that date they returned to the house near Georgetown, that he might attend to his duties in Congress. It further appeared that he had continued the practice of law in Maryland and had declined practice in the District of Columbia; and that in January, February, and March, 1806, he had declared that he intended to reside in Maryland, and that he bought the land with that intention. It was urged and admitted that the Maryland house was fitted only for a summer residence, and was much inferior to the house near Georgetown; and that the latter was left practically with its furnishings complete whenever the family went to Maryland.

On January 21 and 22, 1808,[5] the report was discussed, but was recommitted because of allegations relating to a matter not referred to in the report and not related to the question of inhabitancy.[6]

On March 17 and 18,[7] the report made by the committee after reexamination, and which was favorable to Mr. Key, was discussed, the form of the question being a resolution as follows:

Resolved, That Philip B. Key, having the greatest number of votes, and being qualified agreeably to the Constitution of the United States, is entitled to his seat in this House.

A motion was made to strike out the words "having the greatest number of votes, and being qualified agreeably to the Constitution of the United States," and a division being demanded, the words "having the greatest number of votes, and" were stricken out.

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[1] First session Tenth Congress, Journal, pp. 2, 6.

[2] Journal, pp. 16, 68.

[3] Another feature of this case is considered in section 441 of this volume.

[4] Journal, p. 68; House Report No. 3; Annals, p. 1490.

[5] Annals, pp. 1490, 1496.

[6] See section 441 of this volume.

[7] Annals, pp. 1845, 1848, 1849.

The question then recurred on striking out "being qualified agreeably to the Constitution of the United States."

It is inferable, although the records of debate are scanty, that the question as to whether or not Mr. Key was a pensioner of the British Government figured largely in this question. The House voted—yeas 79, nays 28—to strike the words out.

• Then, on the question on agreeing to the simple amended resolution that Mr. Key was entitled to his seat, a debate occurred, which, as the Annals state, "appeared to be reduced to the plain fact of residence." The House finally agreed to the resolution7—yeas 57, nays 52.

433. The election case of John Forsyth, of Georgia, in the Eighteenth Congress.

Residence abroad in the service of the Government does not constitute a disqualification of a Member.

On March 3, 1824,[1] the Committee on Elections reported on the case of John Forsyth, of Georgia, that Mr. Forsyth was elected a Member of the present Congress during his residence near the court of Spain, as minister plenipotentiary of the United States. The committee were of the opinion that there was nothing in Mr. Forsyth's case which disqualified him from holding a seat in the House. The capacity in which he acted excluded the idea that, by performing his duty abroad, he ceased to be an inhabitant of the United States. And, if so, inasmuch as he had no inhabitancy in any other part of the Union than Georgia, he must be considered in the same situation as before the acceptance of the appointment.

Therefore the committee asked leave to be discharged from the further consideration of the subject.

This report was pending in Committee of the Whole at the time of the consideration of Mr. Bailey's case, and on March 18, after the decision in that case, the House discharged the Committee of the Whole from consideration of the report, and laid it on the table.

Thus Mr. Forsyth was allowed to retain his seat.

434. The election case of John Bailey, elected from Massachusetts to the Eighteenth Congress.

One holding an office and residing with his family for a series of years in the District of Columbia exclusively was held disqualified to sit as a Member from the State of his citizenship.

Discussion of meaning of word "inhabitant" and its relation to citizenship.

In the earlier years of the House contested election cases were presented by petition.

On February 20, 1824,[2] the Committee on Elections reported on the petition of Sundry Electors *v.* John Bailey, of Massachusetts. This case arose under section 2, Article 1, of the Constitution of the United States, which provides "that no person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen."

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[1] First session Eighteenth Congress, Contested Elections in Congress, from 1789 to 1834, p. 497.

[2] Ibid., p. 411.

The facts were ascertained to be as follows: On October 1, 1817, Mr. Bailey, who was then a resident of Massachusetts, was appointed a clerk in the Department of State. He immediately repaired to Washington and entered on the duties of his position, and continued to hold the position and reside in Washington until October 21, 1823, when he resigned the appointment. It did not appear that he exercised any of the rights of citizenship in the District, and there was evidence to show that he considered Massachusetts as his home and his residence in Washington only temporary. It was shown that Mr. Bailey had resided in Washington in a public hotel, with occasional absences on visits to Massachusetts, until his marriage in Washington, at which time he took up his residence with his wife's mother. The election at which Mr. Bailey was chosen a Representative was held September 8, 1823, at which time he was actually residing in Washington in his capacity as clerk in the State Department.

The conclusions of the committee was embodied in the following:

Resolved, That John Bailey is not entitled to a seat in this House.

In support of this conclusion the committee made an elaborate report, centering entirely around the meaning of the word "inhabitant."

After reviewing the circumstances attending the adoption of this clause of the Constitution, the committee comment upon the fact that the word "resident" had first been proposed, but had been put aside for "inhabitant," as being a "stronger term, intended to express more clearly their intention that the persons to be elected should be completely identified with the State in which they were to be chosen."

The word "inhabitant" comprehended a simple fact, locality of existence; that of "citizen" a combination of civil privileges, some of which may be enjoyed in any of the States of the Union. The word "citizen" might properly be construed to mean a member of a political society, and although he might be absent for years, and cease to be an inhabitant of its territory, his rights of citizenship might not be thereby forfeited. The committee quote Vattel and Jacob's Law Dictionary to show that the character of inhabitant is derived from habitation and abode, and not from political privileges. The committee further fortified their position by an examination of the State constitutions and the laws of the United States.

The committee denied that the expressed intention of Mr. Bailey to return to Massachusetts had any bearing on his status as an inhabitant. It was true that ambassadors and other agents did not suffer impairment of their rights as citizens by residing abroad at the government of a foreign country. That which appertained to ministers of the Government residing abroad could not be supposed to attach to those in subordinate employments at home. The relations which the States bore to each other was very different from that which the Union bore to foreign governments. The several States by their own constitutions prescribed the conditions by which citizens of one State should become citizens of another, and over this subject the Government of the Union had no control. It would, therefore, be altogether fallacious to pretend that the bare holding of an appointment under the General Government, and residing for years in one of the States, should preclude the holder from being a citizen and inhabitant of such State when by its constitution and laws

he was recognized as such. Therefore, as a formal renunciation of allegiance to the State from which he came was not necessary to being admitted to the rights of citizenship in the State to which he went, so the expression of an intention to return would be of no importance. At the time of his election, and for nearly six years before, Mr. Bailey was an inhabitant of the District of Columbia. It had been urged that as the District belonged to the General Government, each State possessed a part, and therefore a resident of the District was not out of the jurisdiction of his State. But this argument would apply equally to inhabitants of all the Territories of the United States, and was plainly more ingenious than conclusive. Moreover, Mr. Bailey had married a wife and established a family of his own, thereby leaving his natural or original domicile in his father's house.

From March 18 to 26 the report was debated at length in Committee of the Whole. In support of the committee's view the suggestion was made that Mr. Bailey, had held another Government office before and after his election to the House, and therefore was ineligible. But in view of the decision in the Herrick case this point was not pressed. In continuation of the reasoning of the report the point was made that Mr. Bailey had no domestic establishment or estate in Massachusetts, unless exception be made of certain books called a "library." The construction put on the word "inhabitant" by the various States was not particularly pertinent, as it might import a different, sense in different States. The construction in the case under consideration called for common sense merely. Mr. Bailey's residence was in the District. He was eligible for office there. If the District were entitled to a Delegate in the House whose qualifications should be that he should be an inhabitant of the District, he would certainly be eligible for that place. Therefore, he must have lost his inhabitancy in Massachusetts. So far as inhabitancy was concerned the District stood on the same basis as the other Territories of the United States. If in this case the inhabitancy in Massachusetts could be maintained, so could all the emigrants to the Territories retain inhabitancy in the States from which they came. A man in one of the States appointed to an office in one of the Territories would be eligible to be chosen Delegate from that Territory. Would he still retain his inhabitancy in the State from which he came? An inhabitant of one State was deprived of the right of being elected in all the other States. Was there any reason why the inhabitants of the District should be more highly favored than the inhabitants of the States? It was inevitable that in moving from State to State political and even personal rights must suffer modification or extinction with the changed condition of law. So in moving to the District certain rights enjoyed in the States were lost. If the residence of Mr. Bailey here had been transient and not uniform; had he left a dwelling house in Massachusetts in which his family resided a part of the year; had he left there any of the insignia of a household establishment; there would be indication that his domicile in Massachusetts had not been abandoned. It had been urged that the expressed intention to return to Massachusetts should govern. But the law ascertained intention in such a case by deducing from facts. The danger of allowing the Executive to furnish Members of Congress from the public service was discussed at length. The committee did not contend that a Member must be actually residing in a State at the time of his election. Foreign ministers going abroad, but from the nature of the case precluded from becoming citizens of a

foreign power or obtaining the rights of inhabitancy, did not lose their inhabitancy at home by absence.

In support of the sitting Member the arguments were urged that the expressed will of the people should be set aside only for conclusive reasons; that a liberal construction had always been given in behalf of the rights of the people in such cases; that the proceedings in the constitutional convention changing the word "resident" for "inhabitant" showed that the framers of the instrument considered that a person might be an inhabitant without actually being a resident. The usages of Massachusetts showed that the word "inhabitant" referred to a person as a member of the political community, and not as a resident. It was probable that the Constitution meant that the meaning of the word "inhabitant" should be settled by the State usage. What decision could be of more force than that of the electors themselves? A person coming from a State to the District, left the direct jurisdiction of his State, but not its participant jurisdiction. An ambassador most certainly became the inhabitant of the foreign country if "local existence" was the test. If "locality of existence" were the test, persons on journeys would be constantly transferring their inhabitancy. The real meaning of "inhabitant" was one who had a "permanent home" or domicile in a place. The intention to return constituted the pivot on which the decision must turn. A man, citizen in one State, going into another to transact business, did not cease to be an inhabitant in the first State. There must be an intention to permanently settle to establish inhabitancy in the second State. No one denied that Mr. Bailey was a citizen of Massachusetts. If a citizen he must be an inhabitant. A citizen was always an inhabitant, but an inhabitant was not always a citizen. No one could be compelled to renounce his native State, yet to deny Mr. Bailey his seat would be in the direction of compelling him to do it against his own will and the will of his constituents. The sitting Member declared himself an inhabitant of Massachusetts, his constituents recognized him as such, and the governor of the State, in effect, had certified him as such. Mr. Bailey had left an extensive and valuable library in Massachusetts, constituting the greater portion of his visible property. Why were they not sold or brought to the District if he intended to settle permanently here? If "locality of existence" were the test, the members of the House might all be ineligible, as they were inhabitants of Washington. Foreign ministers did not lose their inhabitancy because they never intended to settle in the foreign country.

In Committee of the Whole, a motion to strike the word "not" from the resolution was decided in the negative by a vote of 105 to 55.

In the House the resolution of the committee was agreed to, yeas 125, nays 55.

So Mr. Bailey was declared not entitled to the seat.

435. The Virginia election case of Bayley v. Barbour, in the Forty-seventh Congress.

A Member who had resided a portion of the year in the District of Columbia, but who had a home in the State of his citizenship and was actually living there at the time of the election, was held to be qualified.

The Elections Committee held that a contestant could have no claim to a seat declared vacant because of the constitutional disqualifications of the sitting Member.

A suggestion that questions relating solely to qualifications of members should be brought in by memorial rather than by proceedings in contest.

On April 12, 1882,[1] Mr. John T. Wait, of Connecticut, from the Committee of Elections, submitted the report of the committee in the case of Bayley v. Barbour, from Virginia.

As to all of the grounds of contest but one the committee found no evidence to sustain them. The report says:

In disposing of these grounds of contest it is only necessary to state that there was no evidence whatever offered in support of them, and that there was no contention before the committee that they were in point of fact true. Having been abandoned, it appears from the record that of the 27,441 legal votes cast at said election the said Bayley, contestant, received only 9,177. This leaves for the committee's consideration the sole question raised by the first ground set out in the notice of contestant, to wit:

That the said John S. Barbour, at the time of said election for such Representative, was ineligible and disqualified to be the Representative of said district and State.

The said ineligibility and disqualification consists in this, that the said John S. Barbour was not at the time aforesaid either a bona fide resident or inhabitant of said State of Virginia.

When the contestant abandoned the grounds of contest above set forth he at the same time relinquished all right or claim to the seat of the sitting Member, even in the event that the same should be declared vacant on the ground of the constitutional ineligibility and disqualification of its occupant.

In the case as made up and presented to the committee the contestant has only that interest in it that is possessed by every other elector in the district; yet there is no petition or memorial from any body of the electors of the district addressed to Congress setting forth any objection to the right of Mr. Barbour to a seat in the House to which he has been elected on the alleged ground that he is not possessed of those qualifications which, by the Constitution of the United States, are indispensable to the holding of a seat in Congress.

Both upon principle and precedent the committee think that those questions which relate solely to the qualifications of Members of Congress should be more appropriately brought to the attention of Congress by a memorial of the electors who are alone interested in the result. This practice could work no wrong, and would be productive of much good in preventing troublesome and gratuitous contests which might be inspired by motives other than the interests of the electors.

The subject being one of great importance, however, they have considered it on the testimony adduced, which is solely upon the question of the qualification of Barbour under the Constitution of the United States.

In support of the voluntary contest thus made by S. P. Bayley against the eligibility of the sitting Member he proceeded to take the testimony of three witnesses in the city of Alexandria, namely, George Duffey, Augustus F. Idensen, and John S. Barbour, the last named being the returned Member himself, the object being to show that the said Barbour was not a bona fide inhabitant of the State of Virginia, as required by the Constitution of the United States. Mr. Duffey was the commissioner of revenue for the city of Alexandria, and Mr. Idensen was clerk to the State assessor of that city for the year 1880. The contestee, Barbour, on his own behalf, took no testimony, but submitted the case upon the evidence of the contestant.

Duffey testifies that it was his duty to assess all real and personal properties, incomes, licenses, etc., also the annual capitation tax prescribed by law upon all male inhabitants of the State abiding in the city of Alexandria over 21 years of age at the time of the assessment.

That the said Barbour had no real property in the city of Alexandria, but that the property of his wife situated there was assessed to her on the property books as an Alexandrian, the law requiring the residence of the owner to be given. Idensen testifies that this was changed in 1880, when Mrs. Barbour, after the election, was put down as a resident of Washington, D.C., when he, as the assessor's clerk, knew that John S. Barbour was an actual resident in the city, and so stated in his deposition. Mr. Barbour testifies that he was a native of the State of Virginia; had always been a citizen of said State; never claimed to have lived elsewhere in a permanent sense or to have exercised citizenship in any

[1] First session Forty-seventh Congress, House Report No. 1040; 2 Ellsworth, p. 676.

other State or Territory; that his post-office, business headquarters, residence required by statute for the service of legal process upon him, were all in the city of Alexandria, and within the limits of said State, and that while he had a temporary winter residence in the city of Washington, he had taken a house in Alexandria, with his family, in September, 1880, and was so actually residing at the date of the Congressional election in November, 1880, and subsequently.

The Code of Virginia, ch. 166, see. 7, which provides for the manner of serving process against corporations, says:

"It shall be sufficient to serve any process against or notice to a corporation on its mayor, rector, president, or other chief officer, or in his absence from the county or corporation in which he resides, etc., * * * and service on any person under this section shall be in the county or corporation in which he resides; and the return shall show this and state on whom and when the service was, otherwise the service shall not be valid."

Under this statute service of process was habitually made upon John S. Barbour, as president of the Virginia Midland Railway, as a resident of Alexandria.

That in July previous to his nomination for Congress he had declined to be listed by the enumerator of Washington City as an inhabitant of that city, but then stated that he was an inhabitant of Virginia.

That when traveling absent from the State of Virginia he invariably registered himself as from Virginia.

That at the time of the election and before he was actually residing in Alexandria, without any intention of removing therefrom permanently. It was contended on behalf of the contestant that although John S. Barbour was an actual resident of the city of Alexandria, Va., within said district, at and before the time of the election, he was not an inhabitant within the meaning of the constitutional requirements to qualify him as a Member of Congress.

In support of this view the case of John Bailey (Clark and Hall's Contested Election Cases, p. 411) was relied upon. Bailey was chosen a Member of Congress from the State of Massachusetts on the 8th day of September, 1823, at which time he was actually residing in the city of Washington, in the capacity of clerk in the State Department. On the 1st day of October, 1817, Bailey, who was at that time a resident of Massachusetts, was appointed by the Secretary of State a clerk in the Department of State and immediately repaired to Washington and entered on the duties of his appointment. He continued to reside in the city from that time with his family—having in the meantime married—in the capacity of a clerk in the Department of State until the 21st day of October, 1823, subsequent to the date of his election, at which time he resigned his appointment. Upon the petition of certain citizens and electors of the Norfolk district, in the State of Massachusetts, the question of his eligibility and qualification under the Constitution was brought to the attention of Congress, and it was contended on behalf of Bailey that, although he had been from the time of his appointment in 1817 up to and subsequent to his election to Congress a resident of Washington, he had retained his citizenship in the State of Massachusetts, and by virtue of this citizenship it was contended that within the constitutional requirement he was qualified as a Member of Congress from that State. The committee considered at some length the distinction between citizenship and inhabitancy, and their report, which was approved by Congress, against the eligibility of Bailey as a Congressman was based upon these distinctions. It was held that, being a citizen of the State, granting that Bailey was such, but residing permanently elsewhere did not satisfy the constitutional requirements necessary to make him eligible as a Member of Congress. The committee say that "the word 'inhabitant' comprehends a simple fact-locality of existence; that 'citizen' comprehends a combination of civil privileges, some of which may be enjoyed in any of the States of the Union."

The case of Barbour differs materially from that of Bailey in this, that not only had Barbour continued to be a citizen of the State of Virginia, but that he had always held his legal residence in said State as hereinabove recited. Added to that was the fact that previous to his election as a Member of Congress from the Eighth Congressional district of Virginia he had removed to said State and had become an actual inhabitant thereof, residing there without any intention of permanently removing, whereas Bailey was, when elected, an actual inhabitant and resident of the District of Columbia, not claiming a residence or inhabitancy actually in the State of Massachusetts, except constructively through and by virtue of his citizenship, which he contended he had never renounced in said State.

It was contended further by the contestant in this case that the elective-franchise in Virginia was one of the essentials of inhabitancy, and that under the local laws of the State of Virginia a residence

of twelve months within the State, and a residence of three months next preceding the election in the county, city, or town where the person offers to vote, was a requisite qualification of an elector, and that with these requisite qualifications a registration was also necessary; that John S. Barbour had never registered as a voter, and therefore he was not an inhabitant within the contemplation of the Constitution.

It was contended that the word "inhabitant" embraces citizenship; that an inhabitant must be entitled to all the privileges and advantages conferred by the laws of Virginia, and that the elective franchise alone confers these; therefore an inhabitant must have a right to vote and, further, that the burdens of inhabitancy were predicated upon the right to vote.

In answer to this position, without deeming it necessary upon the facts of this case to enter into the constitutional signification of inhabitancy, it is only necessary to say that the right to vote is not an essential of inhabitancy within the meaning of the Constitution, which is apparent from an inspection of the Constitution itself. In Article 1, section 2, the electors for Members of Congress "shall have the qualifications requisite for electors of the most numerous branch of the State legislature," but in the succeeding section, providing for the qualifications of Members of Congress, it is provided that he shall be an inhabitant of the State in which he shall be chosen. It is reasonable to conclude that if the elective franchise was an essential the word "elector" would have been used in both sections, and that it is not used is conclusive that it was not so intended.

In the case of Philip Barton Key (Clark and Hall's Contested Election Cases, p. 224), who was elected a Member of Congress from Maryland on the 6th day of October, 1806, and who was seated as such, the facts are these: Mr. Key was an inhabitant of the District of Columbia, and in November, 1805, he purchased about 1,000 acres of land in Montgomery County, Md., about 14 miles from Georgetown; that some time in the summer of 1806 he caused a dwelling house to be erected on said lands, into which he removed with his family on the 18th September, 1806; that he was residing in said house, which was only partially completed, from that time up to the 20th of October, 1806, when he removed back with his family to his seat in the District of Columbia, where he remained till about the 28th of July, 1807, when they again removed to his estate in Montgomery County, where they remained till the 20th of October, 1807, when they again returned to his seat in the District of Columbia. He was only living and inhabiting within his said district in Maryland for the period of little upward of a month, during which time, to wit, on the 6th day of October, 1806, the election took place, at which he was returned as a Representative to Congress from said district. Notwithstanding this short residence, and the fact that Mr. Key, before his removal to Maryland, had been confessedly a citizen and inhabitant of the District of Columbia, it was decided by Congress that he was eligible and qualified under the Constitution as a Member of Congress.

In further answer to the position that the elective franchise is necessary to qualify one as a Member of Congress, it will appear from an inspection of the constitution of Maryland of 1776, and in full force in 1806, when Mr. Key was elected a Member of Congress from Maryland, that the qualifications for electors for the most numerous branch of the legislature—

"Shall be freemen above twenty-one years of age, with a freehold of fifty acres of land in the county in which they offer to vote, and residing therein, and all freemen having property in this State above the value of thirty pounds current money, and having resided in the county in which they offer to vote one whole year next preceding the election."

Therefore, Mr. Key, who was deemed qualified as a Member of Congress, was not an elector of the State of Maryland, and could not vote at the election at which he was returned as a Member.

Without resting this case, however, upon these grounds, the committee are satisfied from the facts of the case, as developed in the testimony, that John S. Barbour was, in point of fact, before and at the time of his election as a Member of Congress from the Eighth Congressional district of Virginia, an actual inhabitant of the State, enjoying all the rights and subject to all the burdens as such, and that having been duly elected as a Member of Congress from said district he is entitled to his seat.

Resolved, That John S. Barbour was duly elected and is entitled to his seat as a Member of the Forty-seventh Congress from the Eighth Congressional district of the State of Virginia.

The resolutions were agreed to by the House on April 12 without debate or division.[1]

[1] Journal, p. 1031; Record, p. 2811.

436. The Virginia election case of McDonald v. Jones, in the Fifty-fourth Congress.

A contestant who had his business and a residence in the District of Columbia and had no business or residence in Virginia was held ineligible for a seat from that State.

The legal time for serving a notice of contest in an election case is extended by the House only for good reason, and where there seems to be reasonable ground for a contest.

On February 28, 1896,[1] the Committee on Elections No. 1 reported on the case of McDonald *v.* Jones, from Virginia. In this case the contestant applied for leave to serve notice of contest, which he had not served within the time required by the statutes. The committee concluded that with reasonable diligence the notice might have been served within the prescribed time. They did not, however, rest their rejection of the application on this ground entirely, but reported—

(1) That they were convinced from the proofs presented at the hearing that there was no substantial ground for a contest and that the same could not be maintained successfully if the notice should be authorized.

(2) It also appeared that the contestant "at the time of the election in 1894, and prior to and since that time, was engaged in business and resided with his family in the city of Washington, in the District of Columbia, and that he had no place of business and no business or residence of any description in the State of Virginia; and the committee is of opinion that he was not an inhabitant of the State of Virginia at or near the time of the election for Representatives in Congress in the First Congressional district of said State in 1894; and that he was not eligible for said office at or near the time of the said election in the year 1894."

The House, without debate or division, agreed to the resolution of the committee denying the application of the contestant.

437. The Senate considered qualified a Senator who, being a citizen of the United States, had been an inhabitant of the State from which he was appointed for less than a year.—On June 2, 1809,[2] Stanley Griswold, appointed a Senator by the executive of the State of Ohio to fill the vacancy occasioned by the resignation of Edward Tiffin, was qualified and took his seat. On June 9 his credentials were referred to the Committee on Elections, and on June 15 Mr. James Hilhouse, of Connecticut, chairman of that committee, submitted this report:

> That Edward Tiffin, a Senator for the State of Ohio, resigned his seat since the last session of the legislature of said State and during their recess; that on the 18th day of May last, and during said recess of said legislature, said Stanley Griswold was appointed by the governor of said State to fill the vacancy occasioned by the resignation aforesaid; that said Stanley Griswold, being a citizen of the United States, removed into the said State of Ohio and has there resided since September last, but the term of residence or other qualifications necessary to entitle a person to become an inhabitant of said State are not, so far as the committee have been able to discover, defined either by the constitution or laws of said State; but the executive who made the appointment having certified that said Stanley Griswold is a citizen of said State, the committee submit the following resolution.

[1] First session Fifty-fourth Congress, House Report No. 568; Journal, p. 254; Record, p. 2281.

[2] Election Cases, Senate Document No. 11, Fifty-eighth Congress, special session, p. 174.

And thereupon the Senate—

Resolved, That Stanley Griswold, appointed by the governor of the State of Ohio as a Senator of the United States, to fill the vacancy occasioned by the resignation of Edward Tiffin, is entitled to his seat.

438. The Senate overruled its committee and held as qualified Adelbert Ames, who, when elected Senator from Mississippi, was merely stationed there as an army officer, but who had declared his intention of making his home in that State.

Credentials unusual in form and signed by the Member-elect himself as "major-general" and "provisional governor" of Mississippi, were honored by the Senate.

On March 18, 1870,[1] Mr. Roscoe Conkling, of New York, in the Senate submitted the following report from the Committee on the Judiciary:

The Committee on the Judiciary, to whom were referred the credentials of Adelbert Ames, claiming to be a Senator-elect from the State of Mississippi, report the following facts and conclusions:

Mr. Ames was born in Maine in 1835, and resided with his parents in that State until 1856, when he entered the Military Academy at West Point. From 1856 he remained in the military service of the United States until he resigned his commission, which he states was after the passage, but before the approval by the President, of the bill finally declaring Mississippi entitled to representation in Congress.

Until 1862 his parents continued to reside in Maine, and such articles and papers of his as would naturally be kept at his home remained at his father's house. In 1862 his parents removed to Minnesota, carrying with them the effects of their son in their possession, and in subsequent years he occasionally revisited Maine, but owned no land and occupied no habitation there of his own.

In 1868 he was ordered to Mississippi; on the 15th of June in that year he became provisional governor by appointment of General McDowell, then district commander, and in March, 1869, he became himself district commander by assignment of the President of the United States. These relations continued, modified, if modified at all, only as will presently appear.

The election seems to have been regular, and waiving any criticism of the form of the certificate, no question has been made touching the right of Mr. Ames to take his seat, except in regard to the legal character of his residence in Mississippi.

The provision of the Constitution of the United States under which the question arises is this:

"No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen."

It will be seen that to be eligible as a Senator of the United States a person, in addition to other qualifications, must be an inhabitant of the State for which he is chosen, and he must be such an inhabitant "when elected."

The election in this instance occurred on the 18th day of January, 1870.

At this time Mr. Ames was a military officer, stationed in Mississippi by order of superior military authority, and acting as provisional governor by appointment from General McDowell, as already stated. His presence in these two characters comprises everything bearing upon the question of his residence in Mississippi down to the time when he became a candidate for the Senate. The precise date can not be fixed, but not long before the election General Ames determined to allow his name to be submitted to the legislature as one of those from which the choice of Senators might be made.

Having reached this determination, and in connection with it, General Ames declared, as far as he did declare it, his intention in regard to his future residence. His language as delivered to the committee touching his declarations and acts is as follows:

"Upon the success of the Republican ticket in Mississippi I was repeatedly approached to become a candidate for the United States Senate. For a long time I declined—I wrote letters declining. A

[1] Second session Forty-first Congress, Senate Report No. 75; Election Cases, Senate Document No. 11, special session Fifty-eighth Congress, p. 375.

number of persons in Mississippi visited this city to find arguments by which I might be influenced to become a candidate. I hesitated because it would necessitate the abandonment of my whole military life. Finally, for personal and public reasons, I decided to become a candidate and leave the Army. My intentions were publicly declared and sincere. (The intentions thus declared were not only to become a candidate for the Senate, but to remain and reside in Mississippi.) I even made arrangements, almost final and permanent, with a person to manage property I intended to buy. This was before I left Mississippi. My resignation was accepted by the President before he signed the bill to admit the State."

The conclusion of the committee upon these facts is that General Ames was not, when elected, an inhabitant of the State for which he was chosen, and that he is not entitled to take his seat.

The committee therefore recommend the adoption of the following resolution:

Resolved, That Adelbert Ames is not eligible to the seat in the Senate of the United States to which he has been appointed.

In opening the debate in support of the resolution, on March 22,[1] Mr. Conkling cited the definitions of "inhabitant" and the precedents of the House in the cases of John Bailey, Jennings Pigott,[2] the British cases of Brown *v.* Smith and Cockrell v. Cockrell. Commenting on what might be considered ambiguous language in the report, Mr. Conkling said that General Ames had not been able to affirm that it was his intention to remain in Mississippi in the event that he should not be elected to the Senate. In opposition, however, it was urged[3] by Mr. Jacob M. Howard, of Michigan, that General Ames had determined irrevocably to make Mississippi his home, and that this was not at all a conditional determination. Mr. Howard also cited the opinion of Chief Justice Shaw as to habitancy (17 Pickering, 234):

> It is often a question of great difficulty, depending upon minute and complicated circumstances, leaving the question in so much doubt that a slight circumstance may turn the balance. In such a circumstance the mere declaration of the party, made in good faith, of his election to make the one place rather than the other his home would be sufficient to turn the scale.

Against this, on March 23, was cited an opinion of Chief Justice Parker in support of the argument that General Ames did not go to Mississippi of his own free will, and, moreover, that he sustained no municipal relations as a citizen there, and therefore that he was not an inhabitant.

The report was debated at great length on March 22, 23, and 31, and April 1,[4] and on the latter day the motion of Mr. Charles Sumner, of Massachusetts, that the word "not" be stricken out was agreed to—yeas 40, nays 12.[5]

Then the resolution, as amended, was agreed to without division and Mr. Ames took the oath.

A question was also raised in this case as to the credentials. Mr. Ames, as "brevet major-general United States Army and provisional governor," certified to his own election to the Senate.[6] This point was discussed somewhat in the debate,[7] but did not affect the decision.

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[1] Globe, pp. 2127–2129.

[2] See Section 369 of this volume.

[3] Globe, p. 2131.

[4] Globe, pp. 2125–2135, 2156–2169, 2303–2316, 2335–2349.

[5] Globe, p. 2349.

[6] Globe, p. 2125.

[7] Globe, p. 2129.

439. A Senator who, at the time of his election, was actually residing in the District of Columbia as an officeholder, but who voted in his old home and had no intent of making the District his domicile, was held to be qualified.—In 1899,[1] the Senate considered the case of Nathan B. Scott, elected a Senator from the State of West Virginia for the term beginning March 4, 1899. Before Mr. Scott appeared to claim his seat certain memorials were presented to the Senate remonstrating against the seating of Mr. Scott. At the beginning of the first session of the Fifty-sixth Congress Mr. Scott was duly seated as a Senator from the State of West Virginia, without objection at the time. Afterwards a resolution was introduced in the Senate declaring that Mr. Scott was not entitled to a seat in the Senate; which was referred to the Committee on Privileges and Elections, with the memorials referred to.

March 20, 1900, the committee submitted a report with an accompanying resolution that Mr. Scott was entitled to a seat in the Senate as a Senator from the State of West Virginia. A minority of the committee dissented.

The principal element of the case was as to irregularities in the West Virginia legislature at the time of the election of Senator. Another objection is thus treated in the majority report presented by Mr. L. E. McComas, of Maryland:

> The fifth objection assigned by John T. McGraw, memorialist, is that at the time of the election of Mr. Scott he was a citizen but not an inhabitant of the State of West Virginia, but was an inhabitant of the District of Columbia.
>
> It is admitted that Mr. Scott was born in Ohio; that when a young man he removed to Wheeling, in West Virginia, engaged in business, had resided there until January 1, 1898, when he was appointed by the President Commissioner of Internal Revenue, and upon his confirmation thereafter he came to Washington to discharge the duties of this Federal office, but with the intent to retain his residence, citizenship, inhabitancy, and domicile in Wheeling, W. Va., his home; that in accord with this intent he exercised unchallenged the right to vote and did vote on November 8, 1898, in the precinct in Wheeling where his residence was and had remained unchanged; that he came here with no intent to change his domicile to Washington from Wheeling, and that he claims to be an inhabitant of Wheeling, W. Va., and that he remained in Washington in the discharge of his official functions with intent to return to his home in Wheeling when his duties of office here ended.
>
> The mere statement of facts should suffice to show that this objection is unfounded. The Federal Constitution requires that the Senator shall bean "inhabitant" of the State. This term is a legal equivalent of the term "resident," and residence is what is required by the law of West Virginia to entitle the male citizens of that State to vote.
>
> The committee, without extended discussion, were unanimously of the opinion that Mr. Scott was an inhabitant of West Virginia at the time of his election to the Senate of the United States and is entitled to retain his seat.

440. During the discussion of the qualifications of a Senator he presented his resignation; but the Senate disregarded it and proceeded to declare his election void.—On March 14, 1849,[2] the Senate was considering the eligibility of Mr. James Shields, of Illinois, to a seat in the Senate, when Mr. Shields tendered a letter containing his resignation. The reading of this letter was not permitted until the pending question had been postponed. Then the letter was

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[1] Election Cases, Senate Document No. 11, special session Fifty-eighth Congress, p. 888.

[2] Second session Thirtieth Congress, Senate Journal, pp. 364, 365; Appendix of Globe, pp. 338, 342–346.

read, and a resolution directing the Vice-President to inform the executive of the State of Illinois of the resignation was offered.

On March 15 the subject was debated at length, it being urged that if the Senate should inform the executive of Illinois of the resignation, that official might assume that such a vacancy existed as he would have the power to fill by appointment; also that the Senate would be precluded from settling the question as to Mr. Shield's qualifications. Finally the resolution directing the executive of Illinois to be informed was laid on the table, yeas 33, nays 14. Then the Senate resumed the subject of qualification and declared Mr. Shield's election void by reason of his not having been a citizen a sufficient time.